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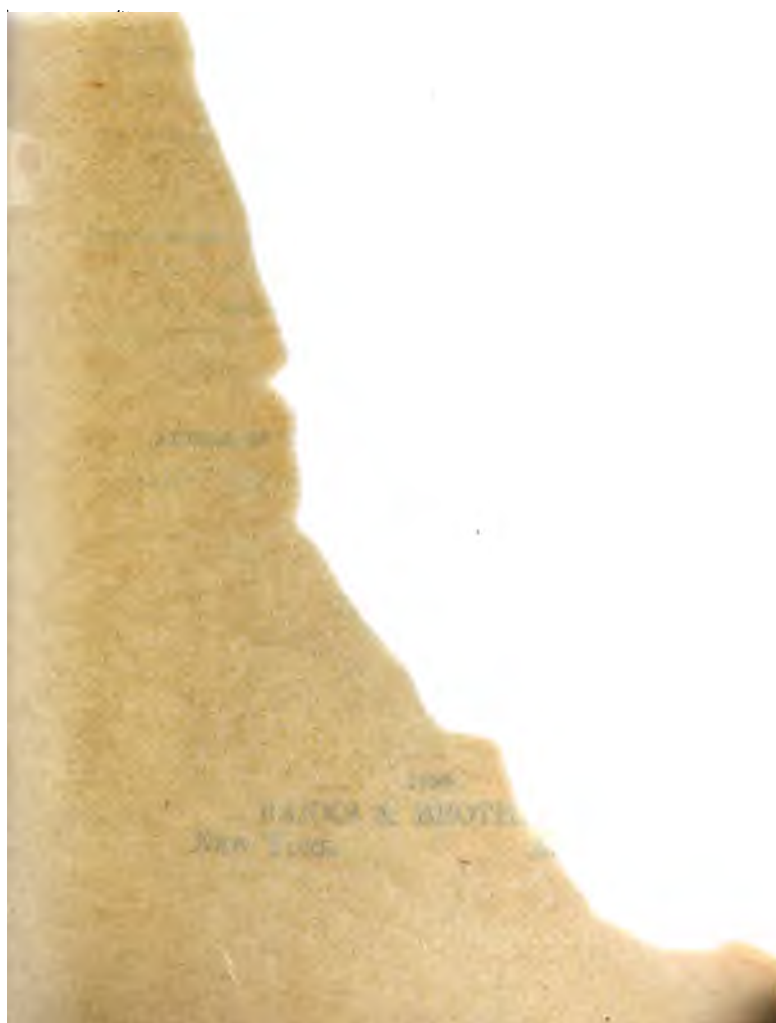
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A TREATISE
ON
THE LAW OF LANDLORD AND TENANT

WITH COPIOUS NOTES AND REFERENCES.

SECOND EDITION.

By H. G. WOOD,

AUTHOR OF "THE LAW OF FIRE INSURANCE," ETC., ETC.

VOL. I.

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PREFACE

TO NEW EDITION.

The lapse of nearly ten years since the original work was published, has made a new edition necessary.

The growth of the law upon this topic has been such that it was found impossible to compress the work into one volume, and for this reason, and to prevent the elimination of useful matter, the publishers decided, and, as I believe, wisely, to issue two volumes. This increase in the proportions of the work has not been wrought by the use of heavier paper and larger type, but includes an actual increase of over three hundred pages of additional matter upon the most difficult and important branches of the subject, which largely increases its value as a ready helper to a lawyer having occasion to look up questions arising under this branch of the law.

H. G. WOOD.

NEW YORK, *October 24th*, 1888.

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THE LAW OF LANDLORD AND TENANT.

CHAPTER I.

LANDLORD AND TENANT.

SEC. 1. When the relation exists.

SEC. 2. The relation may be implied.

SEC. 3. Presumption arising from occupancy.

SEC. 4. Payment of rent.

SECTION 1. When the relation exists.—*A tenant is one who occupies the lands or premises of another, in subordination to that other's title, and with his assent, express or implied.*¹ But, in order to create the relations, the two elements must concur. The fact that one is in the possession of the lands of another, does not of itself establish a tenancy,² because, if he is in possession under

¹ *McKisack v. Bullington*, 37 Miss. 535; *Farrow v. Edmundson*, 4 B. Mon. (Ky.) 605; *Moshier v. Reding*, 12 Mo. 478; *Howard v. Ellis*, 4 Sandf. (N. Y. Superior Ct.) 369.

² *Edmondson v. Kibe*, 43 Mo. 176; *Jordan v. Mead*, 10 La. An. 101. But possession, coupled with circumstances that establish assent upon the one hand, and subordination to title on the other, is sufficient. *Victory v. Stroud*, 15 Tex. 473. Not only may a tenancy in some cases be implied from possession, but also a contract to pay rent. *Jackson v. Mowry*, 30 Ga. 143; *Phelps v. Conant*, 30 Vt. 277.

Littleton v. Wynn, 31 Ga. 589 and, unless the character of the tenancy is such as to negative the existence of a tenancy it has been held that the law will imply a contract to pay rent therefor, *Chambers v. Ross*, 25 N. J. L. 293; *Oakes v. Oakes*, 16 Ill. 106; *Turner v. Davis*, 48 Conn. 397; *Balfour v. Balfour*, 33 La. An. 297; *Bartlett v. Hitchcock*, 10 Ill. App. 87; *Fors v. Driel*, 47 Mich. 201. Though a person in possession under a verbal contract of purchase is a tenant at will, he is not liable for rent so long as he performs the terms of his contract, or they are waived by the vendor, and all improvements

a claim of title in himself, or under the title of another, or even in recognition of the owner's title, but without his assent, he is a mere trespasser, and cannot be compelled to yield rent for his occupancy, nor is he estopped from attacking the owner's title. In such a case, all the elements requisite to create the relation of landlord on the one hand, or of tenant on the other, are lacking, to wit, assent upon the one hand, and subordination to title upon the other. If the owner gives his assent to the occupancy of one who has entered upon his lands adversely, a tenancy is not thereby created. *In order to have that effect, the person in possession must accept such permission, and consent to hold under him, and in subordination to his title.*¹ Where a person goes into

made while such contract is in force are made under the agreement of purchase, and not as tenant. In such case the principles of law applicable to landlord and tenant in relation to improvements made do not apply; but in the absence of any other agreement they become part of the freehold, as in the case of mortgagor and mortgagee. *Lapham v. Norton*, 71 Me. 88. In *Meadville v. Boush*, 92 Penn. St. 327, an ordinance of the city of M. dedicated and set apart certain grounds and spaces as a city market, and directed that the revenues to be derived therefrom should be disposed of annually to the highest bidder, who should be invested with the office of superintendent, and entitled to all fees derived from the rent of stalls and stands, as well as to the fees collected from the vendors of produce, and for the use of the public scales. Plaintiff's bid was accepted, and he became superintendent in 1875. At that time there was a cellar under the market-house. There was no evidence that it had ever been used for the storage of meat or vegetables. In the fall of 1874 it was fitted up and used as a place to confine "tramps." There was a privy-vault in this room, which became offensive the succeeding summer, and the use of the cellar as a "tramp-room" was discontinued. The plaintiff alleged that it affected the entire cellar so as

make it unfit for use by the market people for the storage of meats and vegetables, whereby he was prevented from renting some of the stalls, and was deprived of the use of the cellar for 1875, and he brought an action to recover damages therefor. It was held that there was no contract of letting, and that he could not recover.

¹ *Jackson v. Tyler*, 2 John. (N. Y.) 444. Where the owner does not consent to the occupancy there is no tenancy. *Ackerman v. Man*, 20 Wis. 454, see *hobbs*. A person who entered without the assent of the owner upon a lot that has not been complied with is not a trespasser until after possession has been determined. *son v. Baker*, 4 Dev. In *Wittman v. Milwaukee R. Co.* 51 Wis. 89, a company built a spur on plaintiff's land, part of a portion of the time was thus occupied, and continued the occupancy until its said spur was removed. Plaintiff's land was a foreclosure sale, continuing the occupancy without any notice to plaintiff to hold adversely to him was held.

The presumption was that the defendant held as plaintiff's former tenancy not being a definite period, the fact

the possession of premises wrongfully, it is undoubtedly competent for the parties, by a contract subsequently made, to change the relation from that of a trespasser to that of tenant. But in such a case the contract must be explicit, and embrace all the elements previously referred to; and if it is intended to have the tenancy commence from the date of the original entry, so as to change the owner's remedy for the period of wrongful occupancy, from trespass to an action for rent, the contract should explicitly embrace the whole period of occupancy, or neither the character of the prior occupancy, nor the remedy, will be changed.¹ PATTERSON, J., in an English case² said, "Use and occupation may arise from the *waiver* of a tort, or from simply letting into possession." But it is apprehended that an action for use and occupation could not be maintained for a *tortious* entry and occupancy, because the owner of premises cannot by electing to do so, compel a person, who entered into the possession of premises against the owner's right, to occupy towards him the relation of tenant, unless such person elects to assume that relation. That is, the owner cannot, at his option, elect to treat such person as a wrongdoer or a tenant; but, in order to enable him to treat him as a tenant, and proceed against him for rent, *the relation between them must be such as to raise the presumption of a contract*, or the remedy is by an action *ex delicto*.³ A contract to pay rent is not essential in order to

that the landlord began proceedings against tenant railroad company to compel it to pay for the lot, which proceedings resulted in a surrender of the possession to him, would not prevent his recovering for the use and occupation prior to the commencement of such proceedings.

In *Adams v. Bigelow*, 128 Mass. 365, the owner of land, subject to a mortgage which he had not assumed, leased the land. A few days before an instalment of rent became due, the mortgagee foreclosed and demanded rent, and the tenant attorned to him. It was held, that the owner could not maintain an action against the tenant for the whole or any part of this instalment.

¹ *Howard v. Carpenter*, 11 Md. 259. An instrument by A., transferring to B. the use and occupation of a specified parcel of land for five years, and for such time as B. might require to mine all the iron ore therein, B. to pay to A. 20 cents for each ton removed, and to remove at least 8,000 tons a year, was held to be a lease, notwithstanding a stipulation leaving it optional with B. whether to remove ore where the vein might cease to be 15 inches thick. *Gilmore v. Ontario Iron Co.*, 22 Hun (N. Y.) 391.

² *Church v. Imperial Gas Light Co.*, 6 Ad. & El. 854.

³ *Mayor of Stafford v. Till*, 4 Bing. 77, opinion of BEST, J.

create the relation,' although this is the usual incident of tenancy.' It is competent for a person to permit another to occupy his premises *gratis* if he chooses to do so, and if the person enters into possession under such permission, the fact that no rent was to be paid, or that no term was agreed upon, does not divest them of the relation of landlord and tenant. Thus, if a man, with his family, moves into the house of another, by his invitation, and remains there and takes care of him until his death, he is a tenant at will, even though no rent whatever is or was to be paid.' In order to create the relation of landlord and tenant, no particular words are necessary; but the intention of one party to dispossess himself of the premises, and of the other to enter and occupy them, as the former himself had a right to do, must in some way appear,' and in all cases where the facts are disputed, the question as to whether a tenancy exists is for the jury.' In a Vermont

¹ McKissack v. Bullington, 37 Miss. 535.

² Herrell v. Sizeland, 81 Ill. 457; McKissack v. Bullington, 37 Miss. 535. A person who lives in a house rent free by the sufferance of the owner, is a tenant at will. Rex v. Collett, R. & R. C. C. 498; Rex v. Jobling, 2 Russ. C. & M. 28. Thus in Rex v. Fillongley, 1 T. R. 458, it was held that the words "I give you a close to enjoy as long as I please, and to take again when I please, and you shall pay nothing for it," constituted a tenancy at will. See also, Nichols v. McKaey, 10 B. & C. 721; Jones v. Jones, 10 id. 718, and any compensation paid or service rendered for the use of premises, however slight, is treated as rent, and establishes a tenancy.

Thus a person who occupies a house on condition that he shall sweep a church, Edney v. Benham, 9 Jur. 662, or ring the church bell, is a tenant paying rent. Edney v. Billett, 9 Jur. 662.

³ Herrell v. Sizeland, 81 Ill. 457. In Health Department v. Police Department, 41 N. Y. Superior Ct. 323, it was held, that one who *permits* another to enter upon his

premises, and occupy them rent free, such possession being only for a temporary purpose, cannot regain possession by force, and in this case, it was held that the police department of a city have no greater rights than an individual.

⁴ Moshier v. Reding, 12 Me. 300; Waller v. Morgan, 18 B. Mon. (Ind.) 136. See Kunkle v. Phila. Rifle Co. 10 Phila. (Penn.) 52; Chatard v. O'Donovan, 80 Ind. 20; 41 Am. Rep. 782.

⁵ In Franklin Telegraph Co. v. Pewtress, 43 Conn. 167, the defendant engaged desk room in a part of the office of the plaintiff at a rent of \$250 a year, the term to begin on the 1st of the succeeding April. During the month of April he was several times at the office, sometimes alone, and sometimes with a person in his employment or in partnership with him, spoke to the agent in the office about a railing to be made, and as to the place to put his sign. The railing was never made nor the sign put up. He also engaged the agent to act for him in attending to inquiries, and on one occasion left some parcels at the office and placed his business cards in the front win-

case¹ the executor of an estate permitted the father of a devisee, who lived with him, to occupy the lands of the deceased, and it was held that from such occupancy with the assent of the executor, a contract to pay for the use of the premises could not be implied. And the same rule prevails when a vendor of lands remains in possession after conveyance, with the assent of the purchaser, but without any agreement to pay rent.² But a person in possession under a contract to purchase, may relinquish his rights under the contract, and become a tenant, and liable for rent as such, if he remains in possession after such relinquishment.³ So when a contract between an employer and an employee is such that, taken as a whole, it puts the latter in possession of premises for a definite term, the relation of landlord and tenant is created, and the term is not ended by the termination of the employment, unless expressly made conditional upon the employee's continuance in the owner's employment.⁴

So, if a creditor is put into possession of a debtor's lands under an instrument duly executed for that purpose by the terms of which the former is to retain possession and receive the rents and profits until the debt is paid, the relation of landlord and tenant is created between them.⁵

Where lands are occupied by the government without any assertion of title on its part, or objection on the part of the owner, if the officers having control of the

flows, describing it as his office. The court held that it was for the jury to say from this evidence whether the defendant entered into the possession of the office. *Riggs v. Bell*, 5 T. R. 471; *Chamberlain v. Donohue*, 44 Vt. 57.

¹ *Clark v. Clark*, 58 Vt. 527.
² *Preston v. Hawley*, 101 N. Y. 526.

³ *Barton v. Smith*, 66 Iowa 75. But see *Nobles v. McCarty*, 61 Miss. 456, where it was held that the relation of vendor and purchaser cannot by agreement be changed to that of landlord and tenant, so as to affect supervening rights.

⁴ *Whaley v. Jacobson*, 21 S. C. 51; *Snedaker v. Powell*, 32 Kan.

396. An agreement that a person shall have possession of lands for the raising of crops on shares, creates the relation of landlord and tenant, unless a contrary intent clearly appears from the contract. *Birmingham v. Rogers*, 46 Ark. 254. A person who goes into possession of premises under a void lease, as one made upon Sunday, nevertheless becomes a tenant, but the relation arises out of the occupation, and not out of the lease, although the latter is competent to show the agreement between the parties in respect to the occupancy. *Vinz v. Beatty*, 61 Wis. 645.

⁵ *Wills v. Sheever*, 78 Ala. 142.

purposes for which such lands are occupied, promise to pay for such occupancy, the relation of landlord and tenant is thereby created between the government and the owner. Thus in a case before the Court of Claims¹ the United States occupied land for a fort, never asserting title thereto, and the owner not objecting to the occupancy. The officers in possession promised to pay the rent demanded and the Secretary of War sent the vouchers to the treasury for payment. It was held that the relation of landlord and tenant existed *prima facie* between the government and the owner, and that the former was liable to the latter for the use of the land.

A Sheriff or other officer, who, under legal process against a tenant, enters into possession, ousting the tenant, is not, in the absence of an agreement to pay for the use of the premises, a tenant, and the landlord cannot look to him for the rent. Thus, in a Massachusetts case.² An officer kept a keeper in charge of the goods of a lessee of a building, for two months, when he discharged him, leaving the key in the building and the outer door unlocked. As the officer was leaving, the lessor, in the presence of the keeper and owner of the goods, said to the officer, "What shall I do about rent?" to which the officer replied "don't know," whereupon the lessor said, "I notify you now, and the other party too, that I shall claim rent." The lessor then locked the door and retained the key, although he did not use the building for two years when the goods were removed on his demand. In an action for use and occupation against the officer, it was held that the relation of landlord and tenant did not exist between the landlord and the officer, and that no recovery could be had in the action against the officer. In an English case³ it was held that the occupancy of a house pending the execution of a lease, created the relation of landlord and tenant, and that the lessor

¹ Chills v. United States, 19 Ct. of Claims 79.

² Leonard v. Kingsman, 136 Mass. 123.

³ B. v. B., 278.

such a case can maintain *quantum valebat* for the rent although no distress therefor can be made. In another case¹ the tenant had been in possession under a previous lease, and continued in possession pending a treaty for a further lease for seven years, but which came to nothing. But before the treaty for the new lease was at an end, the plaintiff brought ejectment. The Court held that the defendant was a tenant at will, and could be put out at any time without notice, the agreement being void under the statute of frauds. But it being proved that an agreement for a lease had been entered into, and that the lease had been actually prepared and the 31st of July fixed upon as the time when it should be executed, LORD KENYON held that ejectment brought before that date would not lie, as the defendant was in by the lessor of the plaintiff's permission, and consequently was not a trespasser.² An occupation for eighteen years, under a void agreement for a lease for twenty-one years, constitutes a tenancy, although no lease had ever been tendered by the lessor or demanded by the lessee. But where one gets into possession wrongfully, and without the privity of the landlord, a tenancy is not created, although they afterwards enter into a treaty for a lease, but differ as to the terms.³ Thus, in an English case

¹Hollingsworth v. Stennett, 2 Esp. 717.

²Yea v. Bucknell, 1 Camp. 478.

³Knight v. Quigley, 2 Camp.

In Rogers v. Pullen, 2 Bing.

C. 749, the defendant in pos-

session under a lease for fourteen

years assigned the lease by way

of mortgage to plaintiff and

committed a forfeiture, for

which ejectment was brought by

plaintiff. It was afterward agreed

that a new lease should be signed in

the same suit, and a new lease

was signed by plaintiff, who was to

assign the lease to the defend-

ant. The new lease was

delivered to the defendant, saying :

'I have no money

to pay you when

you have

held

that this did not constitute the defendant a tenant from year to year, because there was a condition precedent which he did not perform, and when the first quarter's rent became due, he not having paid it was ejected. Under such circumstances the occupier is a mere tenant at sufferance at most, until he performs, and failing to do so may be turned out without previous demand, *Price v. Price*, 9 Bing. 356. See also *Jackson v. Ashburner*, 5 T. R. 163; *Fisk v. Moores*, 11 Rob. (La.) 279; *Howard v. Carpenter*, 22 Md. 10; *Kerrains v. People*, 60 N. Y. 221; *McEldery v. Flanagan*, 1 H. & G. (Md.) 308.

In an action for the use and occupation of a ferry and ferry-landing, the plaintiff proved that the defendant, who was then in occu-

the plaintiff had a lease of a house and wished to underlet it. While it remained empty, the defendant got into it, intending to take a lease of it from the plaintiff, and some negotiations to that end were afterwards had, but the parties disagreed about some of the details, and no agreement was ever arrived at. Ejectment was brought to recover the possession, and LORD ELLENBOROUGH held that there was no evidence of any tenancy, and that if the defendant could be said to be a tenant of any sort, he was a mere tenant at sufferance, and entitled to no notice to quit. But if a person gets into a house or premises without the privity of the owner, although negotiations are afterwards opened for a lease, he is not a tenant if the negotiations come to nothing.

SEC. 2. The relation may be implied.—In the absence of an express contract, the relation may be implied from the conduct of the parties in reference to each other, and in reference to the premises,¹ as, that the person sought to be charged as tenant, or who, himself, seeks to establish that relation, paid rent therefor to the owner or his agent,² or entered into possession as agent of the owner,³ or under lease that has expired,⁴ or that he en-

pation of the premises under a former agreement, had a conversation with the plaintiff's agent, in which the latter wished the defendant to agree to pay a specific rent, to which the defendant made no other objection than to the amount of rent required, and offered a smaller sum, which was not agreed to, and that the defendant continued to use and occupy the premises. Held, that the evidence was insufficient to establish the relation of landlord and tenant, or to support the action. *Ballentine v. McDowell*, 3 Ill. 28.

¹ *Jackson v. Mowry*, 30 Ga. 143; *Chambers v. Ross*, 25 N. J. L. 293; *Phelps v. Conant*, 30 Vt. 277; *Littleton v. Wynn*, 31 Ga. 583; *Redfield v. Utica, &c.*, R. R. Co. 25 Barb. (N. Y.) 54; *Pinero v. Judson*, 6 Bing. 206; *Gustin v. Burnham*, 34 Mich. 50; *Dunn v. Trustees*, 39 Ill. 578; *Hammerton v. Stead*, 3 B. & C. 478; *Larned v. Hudson*, 60

N. Y. 102; *Anderson v. Midland R. R.*, 30 L. J. Q. B. 94. Taking the key of a house for the purpose of occupancy has been held sufficient to raise an implied tenancy, although the person did not in fact occupy. *Little v. Martin*, 3 Wend. (N. Y.) 219.

² *Porter v. Bieler*, 17 Barb. (N. Y.) 149; *Smith's Landlord and Tenant*, 24, 29; *Thompson v.* 12 Ad. & El. 476; *Riggs v.* T. R. 471; *Braithwaite v. H.* 10 M. & W. 494; *Manning v. Joy, Ry. & Moo.* 355; *R.* v. Gifford, 1 Ad. & El. 307. The same rule applies to a tenant. *Pennington v. L.* 998; *Hill v. South* Co., 11 Jur. N. S. 100; *ler v. Wilkins*, 10 M. & W. 494; *v. Geltmaker*, 10 M. & W. 494.

³ *Farrar v.* 10 M. & W. 494; *Mon.* 100; *8 Bing. 363*; *Benan v. Del.*

tered under an agreement for a lease,¹ or under an invalid lease or agreement for a lease,² or from any acts of the parties, or facts or circumstances that show an intention to create the relation, or that in law do create it. In the case of a lease, void as to its duration, it is nevertheless held that it must regulate the terms on which the tenancy subsists *in all other respects*, as to the rent, the time of the year when the tenant is to quit, the nature of the occupancy, &c. It was also so held in a case where a farm was leased for seven years, by parol, and was consequently void under the statute of frauds, but under which the tenant entered into possession.³ Even where a person enters into possession under a void lease, or under an agreement for a lease which is not executed, he is a tenant, and estopped from denying the title of the person under whom he entered, without first surrendering his possession,⁴ as he cannot controvert the title of him who let him into possession.⁵ It is enough, *if there is permission upon the part of the owner, and an entry*

ahay, 1 H. Bl. 5; Boraston v. Green, 16 East, 71; Schelling v. Holmes, 23 Cal. 227; Baker v. Root, 4 McLean (U. S.), 572; Ames v. Schnesler, 14 Ala. 60. In the case of a tenant continuing in possession after his term expires, in the absence of any new agreement, the law presumes that he holds under and subject to the terms of the previous lease. Quineth v. Carpenter, 85 Mo. 502; Laguerenne v. Dougherty, 85 Penn. St. 45; DeYoung v. Buchanan, 10 Gill & J. (Md.) 149, but this presumption may be overcome by proof to the contrary. Frantz v. Wood, 2 Hill (N. Y.) 367; Bremer v. Knapp, 1 Mass. 332. But the fact of a person continuing in possession cannot be denied if the landlord seeks to enforce such a relation, in the case of a person continuing in possession after his term has expired, the landlord may elect to hold him as a tenant, or as a trespasser, and his election is binding on the person holding over. Hill v. Flinn, 2 Penn.

¹ Warner v. Brown, 8 East, 165

² Riggs v. Bell, 5 T. R. 471; Little v. Martin, 3 Wend. (N. Y.) 219.

³ Richardson v. Harvey, 37 Ga. 224; Thyer v. Society of United Brethren, 20 Penn. St. 60; Patterson v. Hansel, 4 Bush (Ky.), 654; McConnell v. Bowdry, 4 T. B. Mon. (Ky.), 392; Heath v. Williams, 25 Me. 209; Bryne v. Beeson, 1 Doug. (Mich.) 179; King v. Murray, 6 Ired. (N. C.) L. 62.

⁴ Lane v. Edmonston, 1 Ired. (N. C.) L. 152; Wilson v. Smith, 5 Yerg. (Tenn.) 379; Sharpe v. Kelley, 5 Den. (N. Y.) 431. See also holding that a person in possession under a void lease is to be treated as a tenant, and not as a trespasser, Boulton v. Symonds, 10 East, 13; Brune v. Rawlings, 10 id. 261; Martin v. Watts, 7 T. R. 83; Ludford v. Barber, 1 id. 86; Gallaway v. Herbert, 4 T. R. 680; Warren v. Fearnside, 1 Wils. 176. In Beale v. Sanders, 3 Bing. (N. C.) 850, it was held that a tenant who, as assignee under a void lease, had been in possession several years, was bound to repair to the end of the term according to the covenants in the lease.

⁵ See also 4 Cow.

9, 4 M.

or occupancy in pursuance of such permission on the part of the tenant,' and the owner's assent may be implied.¹ Thus, where a lessee for a term assigns the lease, the assignee, without any express contract to that effect, by accepting the assignment, takes it, subject to all its conditions, including the payment of rent as it thereafter becomes due,² or the payment of assessments,³ or the making of repairs, or any other covenant or condition therein that runs with the land,⁴ including the manner of occupancy.⁵ And the assent of the landlord to the substitution of tenants, may be implied although such presumption does not necessarily arise from a mere acceptance of rent by him from the assignee.⁶ An acceptance of rent is the ordinary acknowledgment of tenancy, but is not conclusive.⁷

A tenancy cannot be implied when such an inference

¹ Rainey v. Copps, 22 Ala. 288; McKissack v. Bullington, 37 Miss. 585.

² Jackson v. Tyler, 2 John. (N. Y.) 444; Willison v. Watkins, 8 Pet. (U. S.) 50; McKee v. Angelrodt, 16 Mo. 283; McKeon v. Whitney, 3 Den. (N. Y.) 452.

³ Graves v. Porter, 11 Barb. (N. Y.) 592; Overman v. Sanborn, 27 Vt. 54; Blake v. Sanderson, 1 Gray (Mass.), 332; Main v. Davis, 32 Barb. (N. Y.) 461, and it is held that an action of covenant for arrears of ground rent accruing before the assignment was made will lie against an assignee of a lease, Hannen v. Ewalt, 18 Penn. St. 9.

⁴ Kearney v. Port, 1 Sandf. (N. Y. Superior Ct.) 105.

⁵ Myers v. Burns, 33 Barb. (N. Y.) 401; Tyler v. Heidorn, 46 id. 489. In Arden v. Sullivan, 14 Q. B. 832, the tenant entered into the possession of a house under an agreement made with A and B for a lease for three years, and paid them rent, and so became tenants from year to year to them on such terms of the agreement as were applicable to, and not inconsistent with a yearly tenancy; and afterwards A assigned all his interest in the premises to B, and the tenant continued in occupation, and paid rent to B alone, and it was held to

be reasonable to presume, in the absence of proof to the contrary, that in consideration that B had permitted him to continue the occupancy, he had agreed to hold of B, upon the same terms that he held of A and B, and that B could maintain an action against him in his own name for a breach of the agreement in not repairing, or keeping the premises in repair.

⁶ Where a lease contained a recital as follows: "Said premises are now occupied and to be occupied as a lumber yard," it was held to be a covenant that run with the lands and the erection of buildings by an assignee of the lease was held to constitute a breach thereof, De Forest v. Bryne, 1 E.D. (N. Y. C. P.) 43.

⁷ North v. Nichols, 37 Conn. 300; Burnham v. Hubbard, 36 id. 300; Bacon v. Brown, 9 id. 334. Receipt of rent from the assignee and an allowance made for repairs made by him, has been held sufficient to warrant the jury in finding that the assignee had been accepted as tenant. Woodcock v. Nuth, 8 Bing. 170, so that the landlord gives the assent that the rent must be paid to the assignee. Brown v. Storey, 1 E.D. (N. Y. C. P.) 43.

⁸ Burns v. Sullivan, 14 Q. B. 832; 542; P. 105; 689.

is negatived by the contract or conduct of the parties. Thus, an agreement was made between A and a hotel company, "for the keeping of the hotel for the term of seven continuous years." A, as the landlord was to provide for the hotel; to contract no debts on account of the concern without the consent of the directors; to reside with his family in the hotel, but free of all charge for board or rent; to keep constantly in his employment a book-keeper, who should keep the accounts, and be liable to be discharged by A if the directors disapproved of him; and the books were to be opened for the examination of any of the directors. These particulars of the agreement were followed by provisions for the compensation of A, varying according to the profits, but at least securing him, in any event, a certain compensation of \$4,000 per annum. Another provision in the agreement was, that A's interest was personal merely, not transferable to any one, nor liable for his debts; and, if A should die, that compensation should be made to his representatives. It was held that this agreement was not a lease, and that therefore the contract could have no effect at law, as against the rights of the owners to possession; that A, being in possession, as agent of the owners, to manage for them, had no legal interest in the possession which could be set up against an execution for the debt of the company.¹ When premises are let to a certain person named therein by a lease under seal, although the lessor knew that they were to be used by a firm or by a corporation, and that was the object of the lease, and they are so occupied, yet the lessor cannot recover the rent of the firm or corporation, but must look only to the lessee named in the lease there-

SEC. 3. Presumptions arising from occupancy.—The mere

¹ *Page, 1 Speers (S. C.)*, where the person merely cultivate a crop on shares, 33 Ala. 417; *Brown*, see also *Raw-* 65, where

arises, in such cases as to the character of the occupation. A person employed to grade lots is not a tenant. *Post v. Phelan*, 3 How. Pr. (N.Y.), N. S. 133.

² *Haley v. Boston Belting Co.* 140 Mass. 73.

recover of the defendant either for rent or for the use and occupation of the premises' because there had been no new demise to the defendant, and the defendant not being legally an assignee, the plaintiff's only remedy was against the lessee. Where, however, possession is taken by one, with the permission or assent of the owner, from such possession the relation of landlord and tenant is implied, as well as a promise to pay rent. Thus, it has been held that, where a person agrees to become a tenant of premises, a subsequent occupancy by him will enable the owner to recover the rent therefor, or for their use and occupation, although no lease is made, and any assertion of the right of possession by such person will be sufficient, as the putting up a notice of "to let, inquire within or at —," the defendant's place of business, has been held sufficient.² So, evidence that a person entered into the occupancy of premises under an agreement for a lease, although the agreement is invalid, will give to his occupancy the character of a tenancy.³ So, where the person in possession has admitted a tenancy,⁴ as by submitting to a distress⁵ or by any act that may be treated as an acknowledgment of a tenancy, as the payment of rent,⁶ or even an admission that rent is due. Generally, a tenancy is created by express contract, but it may arise even where the entry was originally wrongful and no contract whatever existed; as, where a person enters upon the land of another as a squatter, expressly disclaiming title in himself, it is held that he holds as tenant at will of the true owner,⁷ and the same rule prevails where a person goes

² Hyde v. Moakes, 5 C. & P. 578.

³ Sullivan v. Jones, 3 C. & P. 578.

⁴ Elliott v. Rogers, 4 Esp. 59.

⁵ Sullivan v. Jones, ante; Pant-
v. Jones, 3 Camp. 372.

⁶ Panton v. Jones, ante, and
a forfeiture, if the lessor re-
sents rent from the tenant by any
claiming the lessee's posses-
sion, his right of re-entry
of the rent on the
due. Mere receipt
the lessee does
it is a

duty due him, but if he distrains
for the rent, or accepts rent for a
period subsequent to the forfeiture,
it operates as an affirmation of the
tenant's right of possession, Green's
Case, Cro. Eliz. 8.

⁷ Porter v. Bieler, 17 Barb. (N.
Y.) 149. The confession of a judg-
ment for the rent in favor of the
landlord is evidence that the rela-
tion of landlord and tenant exists,
Weidner v. Foster, 2 Penn. 23;
Dolby v. Iles, 11 Ad. & El. 335.

⁸ Stamper v. Griffin, 20 Ga. 212;

into possession under an agreement to take a lease but afterwards refuses to do so,' or under a contract to purchase, which he fails to perform.' A mere agreement to take a lease, unless accompanied by an occupancy under it, does not create a tenancy, as there can be no constructive tenancy except where there is an actual demise;³ but it is sufficient if an entry and occupation ensues under the person sought to be charged as tenant, by him in person, or by his agent, or by an under tenant.⁴ In some of the States it is held that a contract to pay rent will be implied from the mere occupancy of premises, unless the character of the occupancy is such as to negative the existence of a tenancy,⁵ and where the tenant disclaims the tenancy,⁶ or where his original entry was tortious,⁷ or under a contract that is inconsistent with the idea of a tenancy, it is held that no such implication can arise.⁸ A tenancy can only exist by vir-

Smith v. Houston, 16 Ala. 111; Weaver v. Jones, 24 Ala. 420; Gay v. Mitchell, 85 Ga. 159.

¹ Dunn v. Trustees, &c., 39 Ill. 578.

² Patterson v. Stoddard, 47 Me. 355; Jones v. Jones, 2 Rich. (S. C.) 542; Love v. Edmondston, 1 Ired. (N. C.) L. 152; Manchester v. Doddridge, 3 Ind. 360; Proprietors, &c., v. McFarland, 12 Mass. 325.

³ Wood v. Wilcox, 2 Den. (N. Y.) 37; Beach v. Gray, 2 id. 84; Tobie v. Smith, 28 Me. 106; Lowe v. Ross, 5 Exchq. 558; Nation v. Tozer, 1 C. M. & R. 172; Edge v. Strafford, 1 C. & J. 391.

⁴ Wood v. Wilcox, 2 Den. (N. Y.) 37, as, if A agrees to let lands to B, who *permits* C to occupy them, B thereby becomes tenant to A and liable for the rent of the premises, Bull v. Sibbs, 8 T. R. 327; Connolly v. Baxter, 2 Stark 525, and this relation continues so long as C continues his occupancy of the premises, unless A, by some acts of his, accepts him as his tenant, Harding v. Crethorn, 1 Esp. 57, of releases B from his tenancy, which, according to LORD KENYON in the last case, may be done by accepting the key of the house or building. See also holding that where

the landlord takes the key and deals with it as if it had become his own, the jury are warranted in finding that he intended to resume possession and to discharge the tenant from his obligations as lessee, Santos v. Hollinshead, 4 Phila. (Penn.) 57; Hegeman v. McArthur, 1 E. D. S. (N. Y. C. P.) 147, but the mere acceptance of the key does not necessarily have that effect, Bloomer v. Merrill, 1 Daly (N. Y. C. P.) 485; Prentiss v. Warne, 10 Mo. 60; Townsend v. Albens, 3 E. D. S. (N. Y. C. P.) 560. See Henderson v. Squire, L. R. 4 Q. B. 170; Levy v. Lewis, 6 C. B. N. S. 766; Ibbs v. Richardson, 9 Ad. & El. 849, holding the doctrine stated in the text.

⁵ Oaks v. Oaks, 16 Ill. 100; Chambers v. Ross, 25 N. J. L. 200.

⁶ Phelps v. Conant, 30 Vt. 200; Jackson v. Mowry, 30 Ga. 140; Littleton v. Wynn, 31 id. 583.

⁷ Wiggin v. Wiggin, 6 N. H. 298; Henwood v. Cheesman, & R. (Penn.) 500; Curtis v. Lunt, 21 Me. 525; Folsom v. Conant, Minn. 420; Watson v. B. & O. R. Co., 33 Vt. 88; Cincinnati v. Anderson, Ohio St. 222; Byrd v. Smith, Ark. 602.

⁸ Little v. B. & O. R. Co., 301; Smith v. Houston, 16 Ala. 111;

tue of a contract, express or implied, consequently, in order to charge a person as tenant, in the absence of an express demise, not only occupation must be shown, but also an occupation under such circumstances that a contract can fairly be implied therefrom,' which can never

Y.) 46; Jones v. Tipton, 2 Dana (Ky.), 295; Wright v. Newton, 5 Tyr. 736. Where a person enters upon premises under a contract to purchase, whether it is carried out or not, he cannot, in the absence of an express contract, be held chargeable as a tenant. He enters and holds as owner, and his occupancy cannot be presumed to be that of a tenant, so that an action for use and occupation will lie against him, Smith v. Stewart, 6 John. (N. Y.) 46; Watkins v. Holman, 16 Pet. (U. S.) 25; Bull v. Ellis, 1 Stew. & P. (Ala.) 294; Little v. Pearson, 7 Pick. (Mass.) 301; Curtis v. Treat, 21 Me. 525; White v. Livingston, 10 Cush. (Mass.) 259; Stone v. Sprague, 20 Barb. (N. Y.) 509; Howard v. Shaw, 8 M. & W. 118. But, if the contract is not carried out, through the refusal of the tenant to accept a conveyance, or to perform on his part, he is liable for the use of the premises, from the time that the contract goes off, but not for his occupancy so long as the contract for a purchase was in force, Hull v. Vaughn, 6 Price, 423; Tancred v. Christy, 12 M. & W. 324; Howard v. Shaw, ante; Gould v. Thompson, 4 Met. (Mass.) 224, although in Clough v. Hosford, 6 N. H. 231, it was held that, if a contract of purchase goes off through the fault of the vendee, who entered under such contract, the condition of the permission to enter is broken, and all benefits from the agreement forfeited, and that the vendor may maintain trespass for the entry, or assumpsit at his election. See also Atton v. Pickering, 9 N. H. 494, in which the doctrine of the previous case is sustained by a *dictum* of the court. But the doctrine of this case is hardly sustainable either on principal or authority. In the cases, the right to assumpsit for use and occupation for a period subsequent to the con-

tract by the vendee, is denied, and it is held that trespass is the proper remedy, Bancroft v. Wardwell, 13 John. (N. Y.) 389; Smith v. Stewart, 6 id. 46; Bremer v. Conover, 18 N. J. L. 215; Bell v. Ellis, 1 Stew. & P. (Ala.) 295, and where the contract is broken up by the vendor, it seems clear that no action for use and occupation can be maintained against the vendee in possession, for an occupancy subsequent to the termination of the contract, Hough v. Binge, 11 Vt. 190; Jones v. Tipton, 2 Dana (Ky.) 295, nor so long as the contract remains in force, Vandenhennel v. Storrs, 3 Conn. 203, nor if it is consummated, can the vendor recover for the use of the premises prior to the conveyance, although the contract was not completed within the time agreed upon, Dennet v. Penobscot Fair Ground Co., 57 Me. 425; Carpenter v. United States, 17 Wall. (U. S.) 439. In Harris v. Frink, 7 Lans. (N. Y.) 35, it was held that a party who enters into the possession of a real property under a contract to purchase and remains in its occupancy until the agreement is performed, does not occupy as a tenant, and has no legal title to crops planted by him, if forcibly expelled from possession by the party with whom he contracted, before harvesting them. For many purposes, however, there is a species of *quasi* tenancy, Kiek v. Taylor, 8 B. Mon. (Ky.) 262; Stansbury v. Taggart, 3 McLean (U. S.), 457.

¹ La Farge v. Park, 1 Edm. Sel. Cas. (N. Y.) 223; Gunn v. Scovill, 4 Day (Conn.), 228; Estep v. Estep, 23 Ind. 114; Pierce v. Pierce, 25 Barb. (N. Y.) 243; Russell v. Fabryan, 31 N. H. 218; Osgood v. Dewev, 13 John. (N. Y.) 240, and it is for the jury to say from all the facts and circumstances, whether a tenancy exists, Chamberlain v. Donahue, 44 Vt. 57. To create the relation of landlord and tenant, an

nor even of a tenancy at all, if the payment is referable to any other consideration,¹ or if paid under such circumstances as clearly to rebut the idea of a tenancy.² In order to constitute a tenancy from a payment of rent *it must be paid in the capacity of a tenant*, and if it is paid in any other capacity, *it does not have that effect.*³ So, too, where rent has been paid by one in the capacity of a tenant, and the term is unexpired, in an action to recover for subsequent rent, the tenant may show that he paid it under a mistake, and that the title of his lessor to the premises has expired.⁴ Thus, in an English case,⁵ the lessor being seized in fee of certain land mortgaged it, but remained in possession and afterwards leased a part of it to Barton, who entered under the lease, after which the lessor executed a second mortgage, and Barton after that paid rent to the second mortgagee. The second mortgagee afterwards leased

¹ Right v. Beard, 13 East. 260; Phillips v. Mosely, 1 C. & P. 262.

² In Strahan v. Smith, 4 Bing. 91, one T holding pictures of P, as security for an alleged debt, hired rooms of the plaintiff in which to deposit them. P having died, the defendants (his administrators) contested T's claim by a suit in chancery. Pending the suit, in order to prevent the pictures from being distrained, they petitioned the Court to satisfy the plaintiff's rent, out of certain funds paid into Court in the course of the cause. T's claim having been disallowed by the Court, the pictures were ordered to be delivered to the defendants, who, *in order to obtain them*, paid rent to the time of delivery. The Court held that the payment of rent under these circumstances did not constitute the defendants tenants to the plaintiff.

³ Best, C. J., in Strahan v. Smith, 4 Bing. 94, in commenting upon the facts of this case, given in the preceding note, and their effect, said: "In order to constitute the relation of landlord and tenant between them (the defendants and the plaintiff), there must have been a contract express or implied. Express contract, there is

none; but it has been urged that such a contract may be implied from the payment of rent by the defendants. There certainly are cases in which such an implication would arise from the payment of rent, but every such implication is liable to be rebutted, and the circumstances under which this rent was paid, do rebut any such implication. The mere payment of rent will not, of itself, constitute a tenancy. In order to have that effect, it must be paid by the party in the capacity of tenant."

⁴ In Neeve v. Moss, 1 Bing. 360, a tenant for life, with power to lease for twenty-one years, leased for fifty-three and died. After his death, and more than twenty-one years after the making of the lease, the lessee underlet: after which the remainderman gave both the lessee and the under-lessee notice to quit, and then gave the under-lessee a new lease, and received rent from him. The lessee distrained on the under-lessee, and it was held that he might plead non-tenuit, because he was entitled to show that the lessor's title had expired.

⁵ Higginbotham v. Barton, 10 Ad. & El. 307.

the balance of the land to the other defendant, Warburton, who also went into possession under his lease. Subsequently, the first mortgagee gave the defendants notice to pay the rent to him, *which they did*. The second mortgagee then brought ejectment against them, and the court held that the defendants might show the existence of the first mortgage; notice from the first mortgagee to them, and payment of rent to him pursuant to such notice: for, although Barton could not dispute his lessor's title *at the time of the demise*, he might show that the second mortgagee had no derivative title from his lessor, and that he was not precluded *by having paid rent to him under a mistake of the facts*. Thus, it will be seen that the question as to whether the payment of rent is evidence of a tenancy, depends entirely upon the circumstances under which it was paid, and although *prima facie* evidence of a tenancy is liable to be rebutted by proof.¹

¹ Strahan v. Smith, 4 Bing. 91; *ginbotham v. Barton*, 11 Ad. & El. Brane v. Rawlins, 10 East. 261; 307.
Right v. Rawdon, 3 id. 260; Hig-

CHAPTER II.

KINDS OF TENANCY.

TENANT BY SUFFERANCE.

- SEC. 5. Definition of term.
- SEC. 6. Tenancy by sufferance—what is.
- SEC. 7. Origin of this species of tenancy—effect of owner's assent—how established.
- SEC. 8. Has no demisable estate—cannot maintain trespass against landlord—not entitled to notice to quit.
- SEC. 9. How the tenancy may be determined.
- SEC. 10. Rent not recoverable.
- SEC. 11. Right of tenant at sufferance to remove fixtures.
- SEC. 12. Tenant liable for damages, when.
- SEC. 13. Landlord's right of election, as to tenant holding over.

SEC. 5. *Definition of term.*—The word tenant is derived from the Latin word *tenere*, which signifies to hold, and as a legal term, is applied to a person who holds or possesses lands or tenements by any species of title, either in fee; for life; for years; from year to year; at will; by sufferance, or under any kind of claim or title which confers an interest in the property, long or short.¹ But the species of tenancy with which we shall deal in this work is that by sufferance, at will, from year to year, for years, and for life.

SEC. 6. *Tenancy by sufferance—what is.*—A tenant by sufferance is one who comes into the possession of real estate lawfully for a specified term or purpose, but who, after his estate is ended, holds over without authority,²

¹ 3 Tomlin's Law Dic. 573.

² Co. Litt. 57 b, Moore v. Lawder, 2 Camp, 308; Simpkins v. Ashurst, 4 Tyrrw, 781; Keay v. Goodwin, 16 Mass. 1; Kingsley v. Ames, 2 Met. (Mass.) 29; Bayley v. Brad-

ley, 5 C. B. 396; Hollis v. Pool, 8 Met. (Mass.) 350; Knight v. Quigley, 1 Stark's, 505; Rising v. Stannard, 17 Mass. 282; Jackson v. McLeod, 12 John. (N. Y.) 195; Jackson v. Parkhurst, 5 id. 191. "An

as a tenant for a year or a tenant for any other specified term or purpose,' who holds over after his term expires, is a tenant by sufferance.¹ So, a mortgagor who remains in possession after a decree of foreclosure has expired, or after a sale of the mortgaged premises under the mortgage,² or a person who enters under a contract to purchase a leasehold interest to be paid for by installments, with a stipulation for a forfeiture in case of non-performance, after condition broken,³ or a lessee of a tenant for life who holds over after the lessor's death,⁴ or a lessee of a tenant in dower,⁵ or by curtesy after the

estate by sufferance," says Blackstone, in vol. 2, c. 150, of his commentaries, "is where one comes into possession of land by lawful title, *but keeps it afterwards without any title at all*. As, if a man takes a lease for a year, and, after the year is expired, continues to hold the premises without any fresh lease from the owner of the estate. Or if a man maketh a lease at will, and dies, the estate at will is thereby determined; but if the tenant cometh into possession, he is tenant by sufferance, Co. Litt. 57 b. But no man can be tenant at sufferance against the king, to whom no laches or neglect in not entering and ousting the tenant is ever imputed by law; but his tenant, so holding over, is treated as an absolute intruder Co. Litt. 57 b. But in the case of a subject, this estate may be destroyed whenever the true owner shall make an actual entry on the lands, and oust the tenant; for before entry, he cannot maintain an action of trespass against the tenant by sufferance as he might against a stranger, Co. Litt. 57 b.; 4 John. (N. Y.) 150; 4 Kent's Com. 117, and the reason is, because the tenant once being in by lawful title, the law (which presumes no wrong in any man) will suppose him to continue upon a title equally lawful; unless the owner of the land by some public and avowed act, such as entry is, will declare the continuance to be tortious, or, in other language, wrongful." "If a tenant, at the expiration of his term, a

tenant becomes tenant by sufferance, 1 Dyer, 62 a pl.; Flower v. Darby, 17 R. 159; Tilt v. Stratton, 4 Bing. 446, and so remains until by payment of rent, or other acknowledgment of tenancy, he is, by construction of law, converted into a tenant at will, or from year to year, Clark v. Smaridge, 9 Jur. 781; Flower v. Darby, ante; Manning v. Lovejoy, 1 Ry. & Moo. 355; Culvert v. Frowd, 4 Bing. 557; Keay v. Goodwin, 16 Mass. 1; Hyatt v. Wood, 4 John. (N. Y.) 150; Wilde v. Cantillon, 1 John. Cas. (N. Y.) 128; Hauxhurst v. Lebru, 88 Cal. 563.

¹ Overdeed v. Lewis, 1 W. & S. (Penn.) 90; Hyatt v. Wood, 4 John. (N. Y.) 150; Keay v. Goodwin, 16 Mass. 1; Wilde v. Cantillon, 1 John. Cas. (N. Y.) 128; Hauxhurst v. Lebru, 88 Cal. 563.

² Stedman v. Gassett, 18 Vt. 346; Kingsley v. Ames, 2 Met. (Mass.) 29.

³ Moore v. Lawder, 1 Stark. 505. Thus, in Cole v. Gill, 14 Iowa, 527, the defendant entered into possession of premises under a bond for a deed, and held over after the premises had been sold upon an execution to satisfy the balance due on the purchase contract, it was held that he became a mere tenant at sufferance, after such sale.

⁴ Torrey v. Torrey, 14 N. Y. 490; Livingston v. Tanner, 14 id. 64; Preston v. Love, Noy, 120; Jordan v. Ward, 1 H. Bl. 99.

⁵ Miller v. Maynewaring, Cro. Car. 397.

death of the person in whom such estate is vested,¹ or an under-tenant who continues in possession after the determination of the original lease,² or a tenant at will who keeps possession, after the will has been determined by the death of the lessor or otherwise,³ although in the case of a tenant remaining in after the determination of an estate at will, but slight evidence will be required to convert it into a tenancy at will again,⁴ and any undue laches on the part of the landlord in entering into possession will have that effect.⁵ The distinction between a tenancy at will and by sufferance is marked. A tenant at will is always in by right; but a tenant by sufferance holds over by wrong, after the expiration of a lawful title.⁶ If there is a joint occupation of land by the owner and another by agreement, the latter cannot be a tenant at sufferance.⁷ But if a person goes into possession under an agreement for a lease by the *cestui que* trust, but pays no rent, and *cestui que* trust dies without executing a lease, he is only a tenant by sufferance as against the trustee.⁸ So, where a person goes into possession under a parol lease for years, but agrees to quit if the demised premises shall be sold within the time, upon the sale thereof he becomes a mere tenant at suf-

¹ Platt on Leases, 97.

² *Simpkins v. Ashurst*, 4 Try, 781.

³ *Knight v. Quigley*, 2 Camp. 505 Co. Litt. 57 b. A valid lease for years, by the owner of premises then occupied by a tenant at will, terminates the tenancy, and makes him a tenant at sufferance of the lessee, *Dillon v. Brown*, 11 Gray (Mass.) 179, and if a part of the estate is leased or sold he becomes a tenant at sufferance as to that, but remains tenant at will as to the remainder, *Dillon v. Brown*, ante.

⁴ In *Bennett v. Turner*, 7 M. & M. 226, PARKE, B., said: "Slight evidence would probably satisfy a jury that a relation so inconvenient as that of a tenancy by sufferance, in which the tenant is not entitled to the fruits of his own industry (as he has no right to the emblements, Vin. Abr. Emble-

ments, 79), would not be long continued." If the lessor receives rent from the tenant, the tenancy by sufferance is at once changed into a tenancy at will, or from year to year, according to the circumstances. *Hollingsworth v. Stennett*, 2 Esp. 716; *Rowan v. Little*, 11 Wend. N.Y. 619.

⁵ *Bennett v. Turner*, ante.

⁶ Co. Litt. 57. b; *Cole on Ejectment*, 546; *Woodfalls' Landlord and Tenant*, 190.

⁷ *Johnson v. Carter*, 16 Mass. 444.

⁸ *Howard v. Carpenter*, 22 Md. 10. So long, however, as the agreement for the lease is operative, he is a tenant at will. Thus, where a tenant held over after the expiration of his lease, under an agreement for a lease of the same, and additional premises, he was held to be a tenant at will. *Emmons v. Scudder*, 11 Mass. 307.

ferance.¹ A person who holds over after the termination of his estate, under an agreement with, or by the permission of one who had no authority in the premises, is a tenant at sufferance. Thus, where a tenant for years, on the expiration of his lease, applied to the attorney who drew the lease for a renewal of it, and the attorney told him that he had no authority to renew it, but that he (the tenant) might keep possession until he heard from the landlord, it was held that the tenant was a mere tenant at sufferance.² A grantor of land, no time being fixed in which possession shall be given, *instantly*, upon delivery of the deeds, or, if a time is agreed upon after the expiration of the time becomes a tenant at sufferance; and if, before the time for delivering up possession, he permits another to enter, they both become tenants at sufferance.³ A tenant who goes into possession under a written lease, at a rent payable quarterly, and holds over after the expiration of his term, is, in the absence of any agreement to the contrary, a tenant at sufferance, and he does not become a tenant at will by virtue of stipulations in the lease that he will "during the said term, *and for such further term as the said lessee or any other person claiming under him shall hold the premises, pay unto the said lessor the said quarterly rent upon the day hereinbefore appointed for the payment thereof,*" and that he will "at the expiration of said term, peaceably yield up unto the said lessors, or those having their estate therein, all and singular the premises." Such a lease does not operate to give the lessee any right to occupy the premises beyond the term fixed therein.⁴

¹ Dallas v. Pool, 3 Met. (Mass.) 350. In *Writer v. Stevens*, 9 Allen (Mass.), 526, two persons entered into an agreement to buy land and build a house thereon. A conveyance was made to one only, who boarded in the house with the other, who paid no rent, but occupied under a written agreement, the premises from whom the legal title was conveyed the land; the other became

a mere tenant at sufferance after the conveyance.

² Jackson v. Parkhurst, 5 John. (N. Y.) 128.

³ Hyatt v. Wood, 4 John. (N. Y.) 150; Wood v. Hyatt, 4 id. 318. In any event a grantor, under such circumstances, is no more than a tenant at will. Jackson v. Aldrich, 13 John. (N. Y.) 100.

⁴ Edwards v. Hale, 9 Allen (Mass.), 462.

SEC. 7. Origin of this species of tenancy—effect of owner's assent—how established.—This species of tenancy is believed to have been originally a mere device to prevent a tenant, who went into possession lawfully, from setting up title in himself by adverse possession, and thus defeating the title of his landlord.¹ The tenancy is of such a nature as necessarily implies an absence of *any* agreement between the owner and the tenant, and if express assent is given by the owner to such possession, the tenancy is thereby, *instantly*, converted into a tenancy at will,² or from year to year, according to the circumstances.³ If a tenant holding the premises for a specific term, hold over, after the term is ended, in the absence of any evidence to the contrary, the presumption is, that his possession is wrongful,⁴ but this presumption may be overcome by *any* evidence that shows that the landlord or owner of the premises *assented* thereto,⁵ as, that the landlord received rent from him,⁶ or after a notice to quit, permitted him to remain upon the premises without suit or objection for a considerable period.⁷

SEC. 8. Has no demisable estate—cannot maintain trespass against landlord—not entitled to notice to quit.—A ten-

¹ Smith's Landlord and Tenant, 81; Fawcett's Landlord and Tenant, 49.

² Rowan v. Little, 11 Wend. (N. Y.) 619; Smith's L. T. 81.

³ Rowan v. Little, ante.

⁴ Brown v. Keller, 82 Ill. 151. This presumption attaches, and it is incumbent on, the tenant to show that the landlord has in some way assented to his holding over, so as to convert his tenancy from that at sufferance, to a tenancy from year to year. *Prima facie* he is a tenant at sufferance, Wilde v. Cantillon, 1 John. Cas. (N. Y.) 123; Jackson v. McLeod, 12 John. (N. Y.) 182. Thus, a tenant, under a written lease, at a rent payable quarterly, who holds over after the expiration of his term, is, *in the absence of any agreement* to the contrary, a tenant at sufferance, and this is so even though the lease contains language from which it may be inferred that a

further term is contemplated. The burden is upon the tenant to show that the landlord has given his assent to his remaining, in some definite manner, and the mere fact that he has made no objection thereto does not change the character of his occupancy, Edwards v. Hale, 9 Allen (Mass.), 462.

⁵ Newell v. Sanford, 13 Iowa, 191.

⁶ Hollingsworth v. Stennett, 2 Esp. 716.

⁷ In Newell v. Sanford, 13 Iowa, 191, the defendant, by the permission of the owner, entered upon premises and erected a house thereon. Shortly after the house was completed, the owner served him with a notice to quit. He did not leave the premises, however, but remained there for several years without molestation from the owner. In an action brought by the owner to recover ~~rent for the use~~ of the house for the period subse-

ant by sufferance has no demisable interest in the premises, at least except against himself,¹ and a tenant under him takes no better title than he himself had.² He stands upon a mere naked possession, and being a wrong-doer, if the landlord so elects to treat him, he cannot maintain trespass against the owner for an entry upon the premises, because the owner has the right to enter and put an end to the tenant's possession by force, *instantly*,³ and this applies to all persons holding under him.⁴ Except where provision is made therefor by statute, he is not entitled to notice to quit;⁵ although at common law where the holding over had been long continued a demand of possession was required,⁶ or an actual entry by the landlord or some person authorized by him, before the landlord could maintain trespass or ejectment against the tenant.⁷ In many of the States provision is now made by statute for the giving of notice, providing how and what notice shall be given, and the practitioner will find it advisable to consult the statutes of his own State upon this question.

SEC. 9. Landlord may dispossess by force—cannot maintain trespass against, until after actual entry.—The tenant's possession, at common law, is treated as wrongful, and he has no interest as against the landlord, or even as against a stranger, except that conferred by possession, and the landlord under certain circumstances can enter

quent to such notice, the court held that the notice did not change the relation or liability of the tenant from what it was before, and that he was not liable for rent.

¹ Weaver v. Belcher, 3 East. 450; Shopland v. Ryder, Cro. Jac. 55; Cole on Ejectment, 456.

² Shopland v. Ryder, Cro. Jac. 55; LORD ELLENBOROUGH in Thunders v. Belcher, 3 East. 451; Hyatt v. Wood, 4 John. (N. Y.) 150.

³ Curtis v. Galvin, 1 Allen (Mass.) 215; Moore v. Mason, 1 id. 407; 9 id. 530; 6 id. 77; 7 Met. (Mass.) 147; 5 Cush. (Mass.) 218.

⁴ Hyatt v. Wood, 4 John. (N. Y.) 150; Wood v. Hyatt, 4 id. 818.

⁵ Hyatt v. Wood, 4 John. (N. Y.) 150; 1 Pick. (Mass.) 10; 10 Bing. 356;

Livingston v. Tanner, 14 N. Y. 64; Torrey v. Torrey, 14 id. 480; Keich v. Hall, Doug. 22; Dorrell v. Johnson, 17 Pick. (Mass.) 263; Hauxhurst v. Lebru, 38 Cal. 563; Allen v. Jaquish, 21 Wend. (N. Y.) 628; Clapp v. Plaine, 18 Me. 624; Stockwell v. Mark, 17 id. 455; Hollis v. Pool, 3 Met. (Mass.) 350; Doe v. Adams, 12 N. J. L. 99; Kingsley v. Ames, 2 id. 29; Wallis v. Delmar, 29 L. J. Exchq. 276; Doe v. Turner, 7 M. & W. 235; Doe v. Maisey, 8 B. & C. 767; Doe v. Lawder, 1 Starkie, 308.

⁶ Price v. Price, ante; Crisp v. Barber, 2 T. R. 749; Harrison v. Murrell, 8 C. & P. 184.

⁷ Co. Litt. 57 b.

and put him out by force, provided he uses no more force than is necessary, and gather the crops, without liability to the tenant,¹ but his original entry having been lawful, the landlord cannot maintain trespass against him until he has determined the estate by an actual entry thereon, or some other equally decisive act.² But as a tenant by sufferance must come into the possession by the act of the owner, if he comes in by any other method, as by act of law, he is a trespasser or abator as soon as the estate or interest acquired by operation of law is determined, and, as against the State, no such tenancy can exist, as the State cannot be held guilty of laches.³

SEC. 10. *How the tenancy may be determined.*—A tenancy by sufferance may be determined at any time by the entry of the landlord without any previous demand or notice to quit,⁴ and he may forcibly eject the tenant, using no more force than is necessary;⁵ but it is held that where a tenant is put out by force, without a previous demand, while he cannot maintain ejectment, he may maintain trespass⁶ for the assault and battery or

¹ *Hilary v. Gray*, 6 C. & P. 284; *Ives v. Ives*, 13 John. (N. Y.) 235; *Jones v. Muldrow*, 1 Rice (S. C.), 64; 12 Vt. 273; *Jackson v. Farmer*, 9 Wend. (N. Y.) 201; 2 W. & S. (Penn.) 225; *Butcher v. Butcher*, 7 B. & C. 399; *Taunton v. Coster*, 7 T. R. 431; 31 Me. 293; *Sampson v. Henry*, 11 Pick. (Mass.) 579; *Newton v. Harland*, 1 M. & G. 644; *Turner v. Maymatt*, 1 Bing. 158; *Taylor v. Cole*, 3 T. R. 292; *Argent v. Durant*, 8 id. 403; *Harvey v. Bridges*, 14 M. & W. 437; *Norton v. Harland*, 1 M. & G. 644; *Pollen v. Brewer*, 7 C. B. (N. S.) 371; *Davison v. Wilson*, 11 Q. B. 890; *Burling v. Reed*, 11 id. 901, but the landlord, while not liable to the tenant, unless guilty of excessive force, subjects himself to an indictment for a forcible entry, *Archibald Pl. & Ev. in Cr. Cas.* 15th Ed. 736. The plaintiff having the right to the possession of a house occupied by the defendant, and having given him notice to quit, afterwards, while the defendant was

temporarily absent, for the day only, from the house, which he had fastened upon leaving, entered the premises by forcing open the door, and placed the defendant's furniture in the street, and fastened up the house and left it. The defendant, on returning, forced open the door, and re-entered and occupied the premises. Held, that the plaintiff's entry was the exercise of a legal right in a legal manner, and that he could maintain trespass *qu. cl.* against the defendant for his subsequent entry. *Mussey v. Scott*, 32 Vt. 82.

² *Jackson v. McLeod*, 13 John. (N. Y.) 182.

³ *Co. Litt.* 57 b.; 2 Bl. Com. 150.

⁴ *Bennett v. Turner*, 7 M. & W. 235.

⁵ *Fifty Associates v. Howland*, 5 Cush. (Mass.) 218; *Currier v. Gale*, 9 Allen (Mass.), 530; *Crisp v. Barber*, 2 T. R. 749; *Harrison v. Murrell*, 8 C. & P. 134.

⁶ *Harrison v. Murrell*, 8 C. & P. 134; *Crisp v. Barber*, 2 T. R. 749.

injury to his goods, but not for trespass to the land, or the disturbance of his possession.¹ The landlord may maintain ejectment against the tenant without any previous demand or notice to quit.²

SEC. 11. Rent not recoverable.—At common law, rent is not recoverable of a tenant by sufferance, and if the landlord elects to treat him as a wrong-doer, he must be content to waive all contract liabilities that might exist if he elected to treat him as a tenant at will.³

Right of tenant at sufferance to remove fixtures.—A tenant for a term, who holds over on sufferance, after his term has expired, may remove such fixtures as he might have removed during the term; but if he is put out of possession, or if he quits in pursuance of a notice and demand of possession, his right to them is gone.⁴

SEC. 12. Tenant liable for damages, when.—Where a tenant holds over after his term has expired and interferes with the re-letting of the premises, he is liable to the landlord for the damages resulting to him therefrom;⁵ but if the premises are leased to another party, and the tenant in possession refuses to let him in, the lessee's remedy is not against the landlord, but against the tenant holding over.⁶

SEC. 13. Landlord's right of election, as to tenant holding over.—When a tenant under a demise for a term holds over after the termination of the time for which the premises were let to him, without any new demise, the landlord may elect to treat him as a trespasser or as a tenant holding under the terms of the original lease,⁷

¹ *Cole on Ejectment*, 456, and the landlord would only be liable for excessive force, or an unnecessary injury to his goods, *Overton v. Lewis*, 1 W. & S. (Penn.) 90.

² *Bennett v. Turner*, 7 M. & W. 226; *Heming v. Brett*, H. & W. 3; *Cole on Ejectment*, 457.

³ *Flood v. Flood*, 1 Allen (Mass.), (Mass.) 42.

⁴ *Wood*, 5 C. B.

N. S. 516; *Woodfall's Landlord and Tenant*, 534; *Gibson v. Hamersmith R. R. Co.*, 32 L. J. Ch. 337.

⁵ *Stoddard v. Waters*, 30 Ark. 156.

⁶ *Gardner v. Ketclas*, 3 Hill, (N. Y.), 530.

⁷ *Hemphill v. Flynn*, 2 Penn. St. 144; *Jackson v. Salmon*, 4 Wend. (N. Y.) 327; *Conway v. Stark-*

unless it appears that by agreement or by notice, the terms of the original agreement or lease were changed and notice given by the landlord to the tenant, *before* the term expires, that, if he remains upon the premises it must be upon certain different terms, specifically stating them. If he remains, whether he signifies his assent thereto or not, he will be treated as subject to the original lease *as amended by such notice*. A tenant for a term, as for two, three or five years, with the privilege of another similar term or some other specified term, by holding over, becomes bound for a second term of equal duration with the first, or for the period reserved to him in the lease.¹ In a Michigan case² the premises were leased for one year, with the privilege of having the same three years at the same rent and at the option of the lessee. The tenant held over one year and five months without giving notice that he would remain

weather, 1 Den. (N. Y.) 11; Phillips v. Monges, 4 Whart. (Penn.) 226. When a tenant holds over, whether he is a tenant for a term of years, or from year to year, he impliedly holds, according to the terms, and subject to all the conditions of the original lease which are applicable to his new situation, and the law will imply those terms which are found in the contract which has expired. DeYoung v. Buchanan, 10 G. & J. (Md.) 149; Doe v. Bell, 5 T. R. 471; Witt v. Mayor, &c. 5 Robt. (N. Y. Superior Ct.) 248; Bradley v. Covel, 4 Cow. (N. Y.) 349; Osgood v. Demey, 18 John. (N. Y.) 240; Quinette v. Carpenter, 35 Mo. 502; Deller v. Roberts, 13 S. & R. (Penn.) Co.; Longuemore v. Daugherty, 35 Penn. St. 45; Right v. Darby, 1 T. R. 162; Moore v. Basely, 3 Ohio, 294; Bacon v. Brown, 9 Conn. 334; Bruner v. Knapp, 1 Pick. (Mass.) 332; Harkins v. Pope, 10 Ala. 493; Hunt v. Wolfe, 2 Daly (N. Y. C. P.), 298; and he is subject to a distress, whether the lease is by parol or by deed. Webber v. Shearman, 3 Hill (N. Y.), 347; Frantz v. Wood, 2 Hill (S. C.) 367. It makes no difference upon what pretence the tenant holds over, the rule is the same in all cases. Thus, where

the defendant held premises under a lease for years, which expired at midsummer, 1821, but he then refused to give up possession, claiming to be entitled to a notice to quit, and he continued to occupy until Christmas, and paid two quarters' rent, it was held that such occupancy conclusively show a new tenancy from year to year, and that he was liable for rent due at Lady's-Day, 1822, although he quit at Christmas, 1821. Bishop v. Howard, 2 B. & C. 100; Waring v. King, 8 M. & W., 571. By holding over he is a wrong-doer, and ejectment lies against him by the landlord without any demand for possession or notice to quit, but if the landlord has in any wise assented thereto, he becomes a tenant from year to year. Den v. Adams, 12 N. J. L. 99; Hemphill v. Flynn, 2 Penn. St. 144, and thereafter is entitled to notice to quit. Jackson v. Salmon, 4 Wend. (N. Y.) 327; Evertsen v. Sawyer, 2 Wend. (N. Y.) 507; Sherwood v. Phillips, 13 id. 479; Abeel v. Radcliffe, 15 John. (N. Y.) 505.

¹ Montgomery v. Hamilton County, 76 Ind. 362; Am. 40 Rep. 250; The bald v. First Nat'l Bank, 42 Ind.

² Delashman v. Berry, 20 Mich. 292.

longer. The court held that he was liable for the whole term of three years. The court said "upon principle, it would certainly seem that the actual continuance of such occupation, was the best and most conclusive evidence of his intention to continue. And as it was his option to have the term expire at one year, or three years, and he had covenanted to deliver up possession at the end of the term, but one inference could legally and properly be drawn from such continuance after the year, to wit, that he intended to continue rightfully according to the terms of his lease, rather than wrongfully, in defiance of its provisions." Thus, in a Missouri case, where a notice was given by a landlord more than three months prior to the expiration of the term, informing the tenant that if he desired to retain the premises he could have them at a specified rate, provided he signified his assent by a certain designated day, but that if he did not accede to the terms offered, but continued to hold, a certain additional rent would be exacted, and the tenant made no answer to the notice, but held over, and at the first rent day thereafter refused to pay the increased rent, but tendered the amount due according to the prior lease, it was held that by continuing in possession after notice and remaining silent, the landlord had a right to construe his silence into an assent or acquiescence and hold him for the increased rent.¹ The

¹ Hunt v. Bailey, 89 Mo. 257. In Roberts v. Hayward, 8 C. & P. 432, a party occupied premises under an agreement for three years at £45 a year, which expired at midsummer, 1826. He did not then go out, nor did the landlord take any steps to compel him, but at Michaelmas following gave him notice to quit at Lady's-Day, 1827, or pay rent at £50 a year. He remained in possession but refused to pay more than £45 rent. The court held that, under the circumstances he must be taken to have acquiesced in the new proposal, and was bound to pay the £50 rent. BEST, C. J., said, "The tenant, under the agreement expiring, 1826. Im-

mediately after that time, the plaintiff was a trespasser; but the landlord was not obliged to treat him as such, but might make proposals to him, to renew the relation of landlord and tenant between them. This he did, and the plaintiff did not say, 'I will go out directly. His silence is tantamount to saying,' 'I will continue in on the terms of your proposal.' I am of the opinion that under the circumstances, the distress was regular. I think the landlord had a right to make any terms he pleased, for the time subsequent to Lady's-Day, 1827, and if the plaintiff would not accept them, to turn him out of possession." In Digby v. Atkinson, 4

old lease controls, except in so far as it has been changed by parol, and the fact that it is by deed or under seal, does not affect the question, because the lease is not the contract under which he holds over, but only evidence to uphold the implied contract resulting from such holding over, except so far as it has been changed by notice or agreement, and assumpsit and not covenant, is the proper remedy for a recovery of the rent or a breach of any of the conditions of the old lease.¹ An alteration in the rent to be paid will not overcome the presumption that the premises in other respects were to be held, subject to the terms of the former demise;² but this presumption may be overcome by proof of an intention to alter the terms, or of a new demise.³ If the rent, under the lease, was payable weekly, monthly, or quarterly, it will be so payable under the new implied demise,⁴ and in *all* respects the covenants and terms of the old demise will apply to that which is implied,⁵ except where the covenants are collateral to its operation, or are such as can only be performed during the term.⁶ When the *title* to premises occupied by a tenant is in dispute, and there is no recognized landlord, a tenant holding over is liable to the person in whom the title is, for their use and occupation, but the rate fixed in the former lease, under

Camp. 276, the doctrine that the tenant holds subject to the terms of the old lease, except as amended by parol was forcibly illustrated. In that case premises were leased to the defendant for a term, the lease containing a condition that the tenant should keep the premises in repair. After his term had expired, he verbally agreed to hold over at an increased rent, nothing more being said by the parties as to the terms of holding. Under these circumstances the court held that he must be presumed to hold under the covenants of the former lease, as far as they were applicable to his new situation, and that a change as to the rent did not amount to a new demise, and the premises having been burned by accident, he was held liable to rebuild them.

¹ See *Digby v. Atkinson* in the last note. *Monck v. Geekie*, 9 Ad. & El. 841.

² *Monck v. Geekie*, 5 Q. B. 841, *Doe v. Ruffian*, 5 Esp. 4; *Digby v. Atkinson*, 4 Camp. 275.

³ *Thetford v. Tyler*, 8 Q. B. 95.

⁴ *Conway v. Starkweather*, 1 Den. (N. Y.) 113; *Dorrill v. Stephens*, 4 McCord (S. C.), 59.

⁵ *Frantz v. Ward*, 2 Hill (S. C.) 367; *Humphreys v. Frank*, 18 C. B. 853; *Harkins v. Pope*, 10 Ala. 493; *De Young v. Buchanan*, 10 G. & J. (Md.) 149; *Breener v. Knapp*, 1 Pick. (Mass.) 332; *Phillips v. Monges*, 4 Whart. (Penn.) 226; *Bacon v. Brown*, 9 Conn. 334.

⁶ *Diller v. Roberts*, 13 S. R. (Penn.) 60.

such circumstances, is not conclusive upon either,¹ when the lease itself contains a provision for renewal, but provides for the appraisement of the premises at the end of the term, and for the payment of a specified percentage upon the valuation so fixed, as rent, under the renewed tenant from year to year under the terms of the old lease and the new rates only take effect *from the time when the renewal lease was tendered.*² But when the circumstances are such that no inference can be drawn as to the terms upon which the tenant did hold over, the question must be left to the jury.³ By the common law, if a tenant who has occupied and paid rent annually, holds over into a new year, it is evidence of a new demise for a year,⁴ or rather from year to year, according to the circumstances,⁵ or a tenant at

¹ VanBrunt v. Pope, 6 Abb. Pr. N. S. (N. Y.) 217.

² Ryder v. Jenny, 2 Robt. (N. Y. Superior Ct.) 65.

³ In Mayor, &c. v. Tyler, 10 Jur. 68, A was tenant to the plaintiff, of premises which the plaintiff gave him notice to quit on the 11th day of October, 1843. After the notice was given, the defendant agreed to take a lease from that day. Before that day, the defendant was, with the consent of the plaintiff, substituted as tenant in the place of A for the balance of A's term. The plaintiff and defendant could not agree as to the terms of the lease to be granted to the defendant; but the defendant continued to occupy premises for half a year after October 11th. It was held that, under these circumstances, there was no presumption that he occupied subject to the terms of the determined lease, but that it was a question for the jury, whether he occupied under the old lease or under a new taking.

⁴ Bacon v. Brown, 9 Conn. 384; Hoof v. Ladd, 1 Cr. (U. S. C. C.) 167; Harkins v. Pope, 10 Ala. 493, but in Alabama it is held that a yearly tenant under a void lease, by holding over, becomes a mere tenant at will, and that his tenancy may at any time be put an end to, by quitting the premises, or by a new tenant taking possession on the

part of the landlord. Crommelin v. Thiess, 31 Ala. 412. In Iowa, in a case where a tenant at will of a lot of land built a house thereon, and was then served by his landlord with a notice to quit, after which however, he remained in possession for several years, by the sufferance and permission of the landlord, it was held that the character of his tenancy was not changed by the notice, and that he was not thereby placed under any different liability than he was under before, and consequently was not liable for the rent of the house built by him. Newell v. Sanford, 13 Iowa, 191. In Maine, by statute, a tenant holding over by consent, after the expiration of his term, is a tenant at will merely, and is only liable for rent so long as he occupies (Kendall v. Moore, 30 Me. 327), and it is held that this tenancy may be determined by him by his doing any act inconsistent with the lease under which he held originally, as by receiving a deed from a stranger, and causing it to be recorded. Bannock v. Whipple, 12 Me. 346.

⁵ Den v. Adams, 12 N. J. L. 99; Jackson v. Salmon, 4 Wend. (N. Y.) 327; Bradley v. Covell, 4 Cow. (N. Y.) 349; Hemphill v. Flynn, 2 Penn. St. 144. In New York city it is held that a tenant who holds over and remains in possession of

will, if the circumstances are such as to rebut a renewal of the former tenancy. Thus, if a tenant whose lease has expired, is permitted to continue in possession *pending a treaty for further lease*, he is not a tenant from year to year, but so strictly a tenant at will, that

premises leased to him at a certain rent with the assent of the owner, after the expiration of the term, without any new agreement as to rent, becomes a tenant from year to year, and liable for the rent at the same rate up to the 1st of May next after the holding under such tenancy commenced. *Witt v. Mayor, &c.*, 5 Robt. (N. Y. Superior Ct.) 248; *Schuyler v. Smith et al.*, 51 N. Y. 808, 17 Am. Rep. 609. To the same effect see *Digby v. Atkinson*, 4 Camp. 275, in which it was held that a tenant holding over, impliedly holds subject to all the conditions in the former leases applicable to his new situation, and that the fact that the lease is in writing and under seal, does not make any difference, and that a parol change in the terms of the lease made to apply to the new situation may be shown, and that the lease will control except as to such changes. The lease is not the contract, but is evidence of the terms of the *implied* contract, and *assumpsit* may be brought to recover the rent, although the lease is under seal and it is also the proper remedy for a breach of any of the conditions of the old lease, and in this lease was held to be a proper remedy for a breach of the conditions as to repairs. *Covenant* would not lie, because the case is not in force, as a lease, but only affords the evidence, from which the terms of the new holding are to be implied. The liability of a party holding over after the expiration of a tenancy by agreement, says Mr. Smith, in a note to *Riggs & Bell*, ante, 2 Smith's L. C. 78 a, is rather a matter of evidence than of law; and although Lord Kenyon, in *Riggs v. Bell*, 5 T. R. 47, and Lord Ellenborough, in *Digby v. Atkinson*, 4 Camp. 278, seem to lay down the rule as one of law, yet in all the more recent cases upon the subject, the existence of any tenancy in the party holding

over, (beyond a tenancy of sufferance, which exists by law in every case where a person holds over by wrong after the determination of a rightful estate, but which imports no privity between the landlord and tenant, Co. Litt. 57 b, 270 b, 271 a,) as well as the terms upon which such tenancy exists, have been considered as questions for the jury: the construction of any written agreement, and the applicability of its terms to a tenancy from year to year, being for the decision of the court. See the remarks of Lord Denman, C. J., and Littledale, J., in *Johnson v. The Churchwardens of St. Peter, Hereford*, 4 Ad. & El. 525; see also *Jones v. Shears*, 4 Ad. & El. 832; *Algar v. Watson, Car. & Marsh*, 494; and *The Mayor of Thetford v. Tyler*, 8 Q. B. 95, in which case Mr. Justice Wightman says, "When a party is allowed to hold over after the expiration of a tenancy by agreement, the terms on which he continues to occupy are matter of evidence rather than of law." The law, it is apprehended, does not infer any particular contract from the mere fact of entry under an agreement for a future lease, or a holding over after the expiration of a past agreement, per Lord Abinger, C. B., *Waring v. King*, 8 M. & W. 575. See also *Jenner v. Clegg*, 1 M. & R. 217; *Jones v. Shears*, 4 Ad. & El. 832; *Chapman v. Towner*, 6 M. & W. 104, per Parke, B.; *Risely v. Ryle*, 11 M. & W. 16; and *The Mayor of Thetford v. Tyler* 8 Q. B. 95. But where the party so occupying pays rent according to the terms of the agreement, either past or future, and thereby becomes tenant from year to year, the inference is irresistible, in the absence of anything to show a different understanding, that the parties intend the occupation to continue upon such of the terms of the agreement as are applicable to such a ten-

he may be turned out of possession without notice.¹ But, if a tenancy has commenced, that is, if there has been a holding over without the intervention of negotiations for a new lease, *for however short a period*, the tenant cannot absolve himself from liability for the rent for the unexpired term that has set in, in consequence of his holding over, by abandoning the possession, if the landlord elects to hold him as tenant,² even though he gave the landlord notice, before his term expired, of his intention *not* to keep the premises.³ The same principle applies where the letting is by the day, week, month or quarter; if the tenant holds over, he is a tenant for another week, month or quarter according to the terms of the agreement under which he entered.⁴ The tenant has no election in the matter. It is not for him to say whether he will occupy the relation of a wrong-doer or of a tenant, but the right of election belongs exclusively to the landlord, and his election binds the tenant, *whatever the tenant's intention may have been*, and although the landlord *knew* what his intentions were before the time expired.⁵ Thus, in the case cited from 51 N. Y., the defendant entered into the occu-

ancy; and this is probably all that was intended by Lord Kenyon in the principal case and by Lord Ellenborough in *Digby v. Atkinson*.

¹ *Hollingsworth v. Stennett*, 2 Esp. 717.

² *In Witt v. Mayor, &c., of N. Y.*, 5 Robt. (N. Y. Superior Ct.) 248, the defendants who entered into possession under a written lease, remained in possession from year to year after the expiration of that lease in May, 1861, until May 1st, 1863, with the assent of the owners, and with the like assent, continued to occupy the premises for at least a week after the last-mentioned date, without giving any notice to the lessor that they would not continue to occupy the premises during the whole of the year, commencing May 1st, 1863. The court held that they were liable for the rent up to May 1st, 1864, although they did

not occupy them. A tenancy at sufferance may exist where the original entry was lawful, *Kenney v. Sweeney*, 14 R. I. 481. A person who enters under a contract with an agent which is never ratified, is a tenant at sufferance, and after demand is made upon him for possession and a refusal to give it, he becomes liable for rent, *Smith v. Singleton*, 71 Ga. 68.

³ *Conway v. Starkweather*, 1 Den. 113; *Schuyler v. Smith*, 51 N. Y. 309; 17 Am. Rep. 609.

⁴ *Gray v. Bompas*, 11 C. B. (N. S.) 520.

⁵ *Conway v. Starkweather*, 1 Den. (N. Y.) 113; *Schuyler v. Smith*, 51 N. Y. 309; 17 Am. Rep. 609; *Hemphill v. Flynn*, 2 Penn. St. 147; *Bacon v. Brown*, 9 Conn. 334; *Harkins v. Pope*, 10 Ala. 493; *Hoop v. Ladd*, 1 Cr. (U. S. C. C.) 167; *Osgood v. Dewey*, 13 John. (N. Y.) 240; *Logan v. Herron*, 8 S. & R. (Penn.) 459.

pancy of a wharf belonging to the plaintiff under a lease for a year, to commence May 1st, 1863. In March, 1864, before the lease had expired, the plaintiff gave the defendants notice that if they desired to take the premises for another year, he would increase the rent one hundred dollars. Upon receiving such notice, and before their term expired, they gave the plaintiff notice that they should not take or keep the premises for another year after the 1st of May, 1864, and then hired another wharf, of which the plaintiff was aware. The wharf rented by them, not being ready for occupancy on the 1st of May, 1864, they continued to land their boats at the plaintiff's wharf up to May 21st, 1864, when they ceased to occupy it at all. The rent was, by the terms of the old lease, payable quarterly, and the rent for two quarters, ending Nov. 1st, 1864, not having been paid, the plaintiff brought an action therefor, to recover the rent at the rates fixed in the old lease. The defendants had offered to pay the plaintiff for the use of his wharf for the twenty-one days that they held over, and insisted that, in view of their notice to him, and the circumstances, they could not be held chargeable for rent, except during the period of actual occupancy. The Commission of Appeals, however, held that they were chargeable as tenants for the whole year, and that they could not by any notice or otherwise, change their relation to the landlord.¹ In an English case² an ap-

¹ The opinion of EARL, C., is given entire, so far as it relates to this question. He said: "The answer admits the relation of landlord and tenant between the parties, as to the wharf, and that the defendants had held the wharf as tenants for several years prior to the 1st day of May, 1864, and paid rent for the same; that the tenancy expired May 1, 1864, and that they held over the term until May 21st. It does not appear precisely what the rights of the defendants were under their lease, nor upon what water the wharf was located. From the fact, however, that it was used for a steamboat landing, we may infer

that it was upon the Hudson river. The defendants admit that they hired the wharf and were tenants of it under the plaintiff, and if they did not have the exclusive right to use it as a steamboat landing, they at least had the exclusive right to collect wharfage from all who did use it. *Commissioners of Pilots v. Clark*, 33 N. Y. 251. I am therefore, of the opinion that the defendants' liabilities are the same as if they hired a house instead of a wharf. The plaintiff claims that because the defendants held over and continued in the occupancy of the premises for three weeks after the expiration of the lease, he had

² *Jones v. Shears*, 4 Ad. & El. 433.

parently different doctrine was held, and the court seemed to be of the opinion that the intention of the tenant was to be considered, as well as the intention of the landlord,

the right to hold them as tenants for the whole year. This they deny, because they gave him notice before the expiration of the term, that they did not intend to occupy the premises for another year, and made arrangements, with his knowledge, to occupy another wharf. I am of opinion that the plaintiff's claim is well founded.

The law is too well settled to be disputed, that where a tenant holds over after the expiration of his term, the law will imply an agreement to hold for a year upon the terms of the prior lease. Woodf. Landlord & Tenant, 218; Right v. Darby, 1 T. R. 162; Bradley v. Covel, 4 Cow. 849; Evertson v. Sawyer, 2 Wend. 507. But the defendants claim that this implication of law may be rebutted, and that the tenants may show by proof that they did not intend to hold upon the same terms as the prior lease; and they claim that the notice which they gave in this case was sufficient to overcome this implication. The argument on the part of the appellants is, that the relation of landlord and tenant for any given time, can be created by agreement only, and, in order to make the agreement there must be mutuality. The minds of the parties must meet, and both assent to the agreement, and that the notice in this case shows that the defendants did not assent to the tenancy claimed. This argument, as applied to most contracts, would be sound. The general rule undoubtedly is, that it takes two parties to make an agreement, and that their minds must meet. But this rule is not of universal application. The law sometimes steps in and makes agreements for parties which they did not mutually intend. A wrong-doer converts my personal property, intending never to pay me for it. I may sue him in trover, or I may sue him as upon a sale, upon an implied promise to pay. Another may receive my money, intending not to pay me. Yet I may sue him for money had and

received, upon an implied promise to pay. In neither of these cases would the wrong-doer have the option to determine whether I should sue him in tort or upon contract. In this case the defendants held over wrongfully. It cannot be disputed that they were trespassers; and their notice did not deprive their act of holding over of its tortious character. The law should not give them the option to determine whether they should be treated as trespassers or as tenants. This option should be accorded to the innocent owner of the property. The law regards the possession of real estate as a great advantage in any dispute in reference to it. And, hence, a tenant who has obtained possession of real estate cannot dispute the title of his landlord; and, having obtained possession from his landlord, he should not be permitted to hold over, deny his tenancy and convert himself, at his option, into a wrong-doer. If he may give notice that he does not intend to hold over as tenant, and yet hold for three or six months, without being a tenant at any time, leaving his landlord to an imperfect and uncertain remedy by action of trespass or ejectment, he may greatly embarrass his landlord and defeat a letting for the balance of the year. The safe and just rule I believe to be the one established by authority, that a tenant holds over the term at his peril; and the owner of the premises may treat him as a trespasser or as a tenant for another year upon the terms of the prior lease, so far as applicable. If the argument of appellants' counsel, as to mutuality and consent of both parties, is sound, then a tenant may hold over an entire year, and give notice at its commencement that he will not pay as much rent as stipulated in the prior lease, or that he will not perform some other covenant contained in the same, and then claim, at the end of the year, that he is not liable to pay the rent, or bound by the covenant,

and that it was for the jury to say whether the tenant, by holding over, intended to continue his tenancy. But the doctrine of this case is contrary to the doctrine of the English courts, both before and since it was made, and is ignored by English text writers, and was expressly repudiated by EARLE, C., in the New York case previously referred to. Indeed, at the Assizes the question does not seem to have been raised, but the case turned upon the

because he did not assent, and, thus that the mind of the parties did not meet. In such case, no matter what objection the tenant made, so long as the landlord did not consent to new terms, he would be bound by the terms of the prior lease.

The conclusion which I have reached upon this branch of the case is sustained by authority.

In *Conway v. Starkweather*, 1 Den. (N. Y.) 113, it was held that where a tenant, before the expiration of his term, communicated to the landlord his determination not to keep the premises another year, but, nevertheless, remained in possession a fortnight after the expiration of the term, such continuance in possession, notwithstanding what had taken place, enabled the landlord to treat him as a tenant for another year, upon the same terms as the prior lease. It was held that the landlord had the election to treat him either as a trespasser or as a tenant. The tenant there claimed, as the defendants do here, that the holding over only furnished presumptive evidence of the continuance of the tenancy, which was sufficiently rebutted by proof that the tenant had given notice that he had hired other premises, and refused to hire the premises in question. But it was held that the act of the tenant, in holding over, gave the landlord the legal right to treat him as a tenant for another year; and that it was not in his power to throw off that character, however onerous it might be. It is conceded on the part of the appellants that this case is an authority in point for the plaintiff herein. But we are asked to overrule it. This we should not do. The case seems to have been well considered. It has stood unquestioned for more than twenty-five

years. It has been cited without disapproval in the following cases: *Hunter v. Osterhoudt*, 11 Barb. 33; *Witt v. Mayor of New York*, 5 Robt. 248; S. C., 6 id. 441; *Giles v. Comstock*, 4 N. Y. 270; *Park v. Castle*, 19 How. Pr. (N. Y.) 29; *Greaton v. Smith*, 1 Daly, 374. In the case of *Witt v. The Mayor of New York*, the tenants gave notice that they had hired other premises, and that they would not hold the premises which they had occupied, and yet, because they held over from the 1st to the 12th of May, during which time they were engaged in removal, they were held liable for another year. This case was twice before the court, was argued by able counsel, and fully considered.

In *Park v. Castle*, Mr Justice BALCOM says: "When a tenant, for a year, or for one or more years, holds over after the expiration of his term, without any express agreement, but with the assent of his landlord, the law implies that he holds the premises upon the former terms for another year."

Willard, in his work on *Real Estate* (p. 97), cites the case of *Conway v. Starkweather*, with approval, and as authority for the doctrine therein enunciated. And the learned editor of the eleventh ed. of *Kent's Com.* Vol. 4, p. 117, citing this case in a note, says: "If the landlord elects, as he may, to treat the tenant as holding under the terms of the original lease, *the tenant cannot deny the tenancy.*"

In *Bacon v. Brown*, 9 Conn. 334, Hosmer, C. J., says: "After the expiration of a lease for a year, if the tenant holds over, the law considers him responsible to his landlord as on a hiring for another year, upon the same terms as before."

question whether the defendants, who went into the the possession of certain mines under a lease for twenty-one years, under which they were to pay a sleeping rent of £100 per annum and a royalty upon the coal mined, having held over into a third year, were chargeable with the rent for that year. The lease contained a condition that the tenants would work the mine "so long as it was workable," and COLERIDGE, J., at the Assizes, held that the mine could not be regarded as "workable" when it was run only at a "dead loss," and that when that condition existed, they had a right to quit. It seems that there was also a provision in the lease that the defendants might at any time put an end to the lease, by giving six months' notice, which was given, but they held over two months after the second year expired, for the purpose of working out certain portions of the coal which they claimed it was usual for a tenant to take away on abandoning such mines. It also appeared that two of the tenants *withdrew* at the expiration of the second year, and consequently that the holding over was by the remaining two tenants. The verdict being for the defendants, was upheld by the court, which, upon the facts, was clearly right, if for no other reason, *because there was no holding over by two of the defendants, and consequently no continuance of the tenancy as to them,*¹ but the ground upon which the judges at King's Bench predicated their judgment, that it was a question for the jury to determine whether the defendants held over *with an intention* of becoming tenants for a longer period, is contrary to the doctrine of *all* the cases, and inconsistent with the principles upon which they rest.² In *all* the cases the doctrine is held that as to the tenant who holds over he is a wrong-doer, and only becomes a tenant upon the terms of the old tenancy, *because the landlord elects to treat him as such.* By the mere act of holding over, he does not become a tenant from year to year.³ Something more must occur

¹ Jones v. Shears, 7 C. & P. 846.

² Jones v. Shears, 4 Ad. & El. 382.

³ Davis v. Crofts, 15 M. & W.

166; Christy v. Tancred, 9 M. & W. 438, affd. 12 M. & W. 316; Waring v. King, 8 M. & W. 571;

in order to show the existence of a tenancy by a renovation of the old contract, and this is done by the landlord making his election whether to treat him as a tenant, or as a trespasser,¹ and the landlord's election is conclusive, both against himself and the tenant, and after he has once disaffirmed the tenancy while the holding over continues, he cannot afterwards set it up for the purpose of enforcing a claim for rent, nor if he has affirmed the tenancy, can he afterwards treat the tenant as a tenant at sufferance merely.² So, on the other hand, if the tenant uses the premises as a tenant, he is estopped from denying that relation and insisting that he is a trespasser.³ But if the doctrine of *Jones v. Shears* is correct, the election lies with the tenant as well as with the landlord, and he may stand as a trespasser or as a tenant, at his option, and the landlord has no election in the matter whatever, but is left at the mercy of the tenant, and the doctrine of the previous English cases would be left without any foundation upon which to stand. "If there is a lease for a year," says LORD MANSFIELD, C. J.,⁴ "and by consent of both parties the tenant continues in possession afterwards, the law implies a tacit renovation of the contract." In a case where the original lease was *void*,⁵ it was said by HATHAM, B., as to the status of a tenant to a tenant for life, who held over after the death of the latter, with reference to the remainder man, "the rent having been received *eo nomine* as rent, which was evidence of a contract, the defendant ceased to be a trespasser," and he held that, though the cases had decided the lease to be void, they did not go the length of decid-

opinion of ABINGER, C. B., GIBSON, J., in *Logan v. Herron*, 8 S. & R. (Penn.) 459.

¹ *Hemphill v. Flynn*, 2 Penn. St. 144; *Bacon v. Brown*, 9 Conn. 834; *Osgood v. Dewey*, 13 John. (N. Y.) 240; *Abeel v. Radcliff*, 18 id. 297; *Lee v. Smith*, 9 Exchq. 965.

² *Featherstonhaugh v. Bradshaw*, 1 Wend. (N. Y.) 134.

³ *Waring v. King*, 8 M. & W. 574.

⁴ *Right v. Darby*, 1 T. R. 159.

⁵ *Martin v. Watts*, 1 Esp. 501. The tenant's assent is irrebuttably

presumed from the fact that he remained in possession. *Conway v. Starkweather*, 1 Den. (N. Y.) 118; *Schuyler v. Smith*, ante; *Hemphill v. Flynn*, 2 Penn. St. 144; *Osgood v. Dewey*, 13 John. (N. Y.) 240; *Hunt v. Bailey*, 39 Mo. 257, and the landlord's assent may be implied from the receipt of rent by him, or any other act that shows that he treated the occupant as a tenant. *Newell v. Sandford*, 13 Iowa, 191; *Hollingsworth v. Stennett*, 2 Esp. 716.

ing that the act of the person in remainder might not create a new tenancy from year to year. This doctrine was affirmed in the King's Bench,¹ LAWRENCE, J., among other things, saying, "if the defendant was not a tenant, he must have been a trespasser, *and so he must have continued if he had remained on the premises for any number of years*; but the plaintiff has, by his own act, admitted the defendant to be his tenant and *cannot, therefore, now consider him a trespasser.*" In none of the cases is there any suggestion that the tenant may elect as to the capacity in which he will hold, but having held over, *and the landlord having elected to treat him as a tenant*, he is presumed to be so, upon the terms of the old agreement.² But in order to have this effect there must be an *actual* holding over, and the implication does not arise from a constructive holding over as, by the accidental detention of the key to the premises beyond the term.³ So, too, the previous occupation must have been in the capacity of tenant under a contract that the person in possession was competent to make.⁴ Thus, in the case last cited, the defendant, an incorporated company, entered into the possession of the plaintiff's premises under a parol lease for a year, and occupied for two years, at the expiration of which time they removed their goods without any notice to quit. They held over for eleven days beyond the second year, but paid a quarter's rent. In an action to recover for the remaining three quarters' rent, the court held that they were not liable for the rent during that period, since they did not occupy, and that no contract could be implied against them, because being a

¹ Martin v. Watts, 7 T. R. 88.

² Lee v. Smith, 9 Exchq. 665; Cumberland v. Glamis, 15 C. B. 348; Tress v. Savage, 4 E. & B. 86; Thomson v. Amery, 13 Ad. & El. 476; Mann v. Lovejoy, Ry. & M. 355. In Giville v. De Rutzen, decided in Exchequer, but not reported, and in a *dictum* of MARTIN, B., in Finlay v. Railway Co., 7 Exchq. 418; the doctrine of Jones v. Shears finds some support.

³ Grey v. Bompas, 11 C. B. N. S. 520. The Court held that the accidental detention of the key by the tenant beyond the expiration of the term, did not amount to *any* evidence of use and occupation by him, so as to render him liable for another quarter's rent.

⁴ Finlay v. The Bristol and Exeter R. R. Co., 7 Exchq. 410; Cole & Gill, 14 Iowe, 427.

corporation, they could only contract under seal. So, too, the holding over must be by the tenant himself or by an under tenant, with his assent, and if he has let in an under tenant who holds over¹ without his assent, the original tenant is not thereby made liable as a tenant from year to year,² nor, if there are two tenants under the original lease, and one only holds over, is the tenant who goes out of possession when the term expires, made liable as a tenant for an additional term, by the acts of his co-tenant.³ Thus, one Crofts and a Mr. Bartlett were tenants to the plaintiff for the term of three years. Crofts never occupied the premises, but Bartlett held over. No assent on Crofts' part to such holding over was proved, and the court held that, as one tenant cannot bind his co-tenant by holding over without his assent, no recovery could be had against Crofts for rent subsequent to the expiration of the term, and such seems to be the doctrine in this country.⁴ But if the lessee gives his assent to such holding over by the under tenant, he is liable to the landlord as tenant for the entire period of holding over. Thus, a lessee of a term underlet the premises, and the under tenant held over for a portion of a year, against the will of the lessee, so that he could not give up the term. But, during such holding over the lessee distrained upon the under tenant for rent previously due, and a few days after the distress was made, the under tenant quit possession, and the lessee surrendered the possession to the landlord, and the court held that this was such a recognition of the under tenant's act, as made the lessee liable for the rent of the premises during the period that they were actually occupied by him.⁵ If a tenant holds over, however, and he has let in

¹ Christy v. Tancred, 9 M. & W. 438.

² Christy v. Tancred, 12 M. & W. 316.

³ Draper v. Crofts, 15 M. & W. 166.

⁴ Christy v. Tancred, 9 M. & W. 438; Tancred v. Christy, 12 M. & W. 316.

⁵ McKing v. Mumford, 10 Wend.

(N. Y.) 351. In Constant v. Abell, 36 Mo. 174, the doctrine of the English cases, was fully adopted. In that case it was held that a lessee of lands, during whose term the military authorities took possession of the premises and held over, without his consent, was not liable to the landlord in consequence of such holding over *even*

an under tenant as to part of the premises, who also holds over, the under tenant assumed the same relation to him that he holds to the landlord.¹ Where premises are let to a tenant for a certain definite period, *with an option of retaining them for a longer term*, and he lets them to an under tenant who holds over, in the absence of notice to the landlord of his intention not to keep the premises beyond the first term fixed in the lease, the tenant will be liable for the rent during the whole period that the under tenant occupies the premises. Under such circumstances, in the absence of notice to the contrary, the landlord has a right to regard the act of the under tenant as evidence that the tenant has exercised his option in favor of retaining the premises.²

An under tenant who thus holds over after the determination of the original lease, and is permitted to remain in possession by the landlord, is *quasi* tenant at sufferance, and the mere fact of occupation, even though rent is paid, does not of itself raise a presumption of a tenancy from year to year, or for years, upon the terms of the former demise. In order to establish such a presumption there must be some evidence of an agreement for a demise for the term.³ During the entire period of holding over, until the landlord has in some manner signified his

though he received rent from the military authorities during his term. That is, the court held that the military authorities stood in the relation of an under tenant, to the lessee, and that, as the under tenant could not bind the lessee by his acts, without his consent, the lessee could not be held chargeable for the rent of the premises during the period that the under tenant held over. In Connecticut, in *Bacon v. Brown*, 8 Conn. 384, it was held that the tenant was rendered liable for the rent for a whole year, by the act of an under lessee in holding over and paying rent to the tenant during part of the year. But in this case the tenant's *assent* was confirmed by the acceptance of rent for a part of the period, and virtually made the holding over by the under tenant, that of the tenant himself.

¹ *ibbs v. Richardson*, 9 Ad. & El. 894.

² In *Waring v. King*, 8 M. & W. 571, under a lease such as is referred to in the text, the defendant sub-let the premises to a tenant who held over, and in an action against him for the rent, LORD ABINGER, C. J., said: "In what capacity, then, is the plaintiff to look to the defendants? Not as trespassers, but as tenants having received their option under the original contract, by communicating an interest to other parties. * I consider, therefore, that until something be done on the one side or on the other to put an end to the interest these parties held under the contract, they remained in the relation of landlord and tenant."

³ *Simkin v. Ashurst*, 4 Tyr. 781.

election, the tenant is a mere tenant at sufferance, and however long continued, cannot be set up as adverse to the landlord or those who claim under him.¹ Thus, a tenant being in possession of lands under a lease for thirty-one years, made in 1753, remained in possession until 1811, and after the expiration of his term he paid no rent nor did he in any manner acknowledge a tenancy. The court held that, after the expiration of the tenancy, he became a tenant at sufferance, and could not set up an adverse title against the lessor or those claiming under him,² but if a new tenant comes in under a lease from the landlord, and the under tenant holds over for a few months and then quits without any notice, he cannot, from the mere circumstance of holding over, be charged with a new continuing tenancy for a year, or made to pay rent beyond the period of his actual occupancy.³ If a person enters upon the possession of premises under a parol lease that is void under the statute of frauds, he may quit possession when the period for which a parol lease would be good has expired; but if he holds over beyond such period, he is liable for another year's rent, or for rent for the balance of the term, if it expires inside of another year.⁴ For other instances as to the effect of holding over, see Chap. V.

¹ Logan v. Herron, 8 S. & R. (Penn.) 459.

² Howard v. Sherwood, 1 Al. & Nap. (Irish) 217.

³ Freeman v. Jury, M. & M. 19.

⁴ Savage v. Dupuis, 3 Taunt, 410.

CHAPTER III.

TENANCY AT WILL.

SEC. 14. What is.

SEC. 15. How a tenancy at will may be created.

SEC. 16. Vendor and Vendee. What relation exists between.

SEC. 17. Rights of tenant at will to crops, &c.

SEC. 18. How determined.

SEC. 19. Notice to quit.

SEC. 14. *What is.*—A tenant at will, *is one who enters into the possession of the lands or tenements of another, lawfully, but for no definite term or purpose, but whose possession is subject to the determination of the landlord, at any time he sees fit to put an end to it.* He is called a tenant at will “because he hath no certain or sure estate, for the lessor may put him out *at what time it pleaseth him.*”

It differs from a tenancy at sufferance, in that, under a tenancy at will, both the entry and the occupancy are lawful until determined by the landlord, while under a tenancy at sufferance, the entry is lawful, but the occupancy is wrongful. “There is a great diversity between a tenant at will, and a tenant at sufferance; for tenant at will is always by rights, and tenant by sufferance enters by lawful lease, and holds over by wrong.”¹ So too,

¹ Munson v. Plummer, 59, Iowa, 120; Duley v. Nully 74, Me. 556; Cunnes v. Feeley, 132 Mass. 846; Johnson v. Johnson, 18 R. I. 467; Sallabah v. Marsh, 34 La. Am. 1053; Ives v. Williams, 50 Mich. 100; Thomas v. Steamship Co., 71 Me. 548; Neumister v. Palmer, 8 Mo. App. 491; People v. Palding, 22 Hun. (N. Y.) 91; Hulett v. Nugent, 71 Mo. 131; Semmes v. United

States, 14 Ct. of Cl. 493; Morgan v. United States, 14 id. 319; Davis v. Murphy, 126 Mass. 143; Brownell v. Welch, 91 Ill. 523; Wilson v. Taylor, 8 Daly (N. Y. C. P.) 253; Williams v. Hodge, 41 Mich. 695; Banks v. Carter, 7 Daly (N. Y. C. P.) 417; Goodman v. Allen, 68 Me. 308; Webb v. Seekins, 62 Wis. 26; LeTaurneau v. Smith, 53 Mich. 473; Mier v. Thiemann, 15 Mo.

a tenant at will is liable for rent, unless he was let in free of rent, and if the rent is fixed, it may be distrained for,¹ or if no rent is agreed, an action for use and occupation may be brought;² while a tenant at sufferance, being a wrong-doer, cannot be compelled to pay rent at all,³ "for it was the folly of the lessor to suffer his lessee at sufferance to continue his possession of the land after his term,"⁴ and if the landlord receives rent from him, he ceases to be a tenant at sufferance and becomes a tenant at will, or from year to year, according to the circumstances.⁵

Either party may put an end to the tenancy at any time he pleases, even though it is expressed to be a tenancy at the will of the lessor only.⁶ Where the tenant holds at a fixed rent, the rent may be distrained for,⁷ or if no rent is fixed upon, and there was no understanding that the tenant should occupy, free of rent, the landlord may recover a fair sum for use and occupation. But there

App. 307; *Allen v. Mansfield*, 82 Mo. 688; *Elwood v. Forkel*, 35 Hun. (N. Y.) 202; *Singer Mfg. Co. v. Sayne*, 75 Ala. 270; Co. Litt. 57 b.; Cole on Ejectment, 448; 2 Blackstone's Com. 145; *Fawcett's L. & T.* 50. "Strictly speaking," says the court in *Sarsfield v. Healey*, 50 Barb. (N. Y.) 345, "an estate at will arises when one man lets land to another to hold at the will of the lessor; the agreement expressly providing that it shall be held at the will of the lessor. But if the tenant be placed on the land without any time prescribed, or rent reserved, and as a mere occupier, he is a tenant at will. Mr. TAYLOR, in his work upon Landlord and Tenant, copying from 1 Platt on Leases, p. 652, says that this species of estate is comparatively unknown. But an examination of the cases discloses that such estates are very well known at the present time both in this country and England, and that the only instance in which the courts have exhibited a tendency to discourage them, is in those instances where a fixed annual or quarterly rent is reserved, fairly referable to a yearly tenancy, in which case,

in the absence of any express agreement creating a tenancy at will, they construe it as a tenancy from year to year. In many of the States, by statute, all tenancies under parol leases are made tenancies at will, and it will be seen by the cases cited hereafter in this chapter, that they were well known to, and recognized by the courts.

¹ *Davies v. Thomas*, 6 Exchq. 858; *Anderson v. Midland R. R. Co.* 30 L. G. B. 94.

² *Hyde v. Moakes*, 5 C. & P. 42; *Marwood v. Waters*, 13 C. B. 820; *Halford v. Hatch*, 1 Doug. 188.

³ 10 Viner's Abr. 415; *Flood v. Flood*, 1 Allen (Mass.), 217. But now, in Massachusetts, and indeed in many of the States, provision is made by statute for the recovery of rent from such tenants.

⁴ *Sir Moile Finch's Case*, 2 Le. 143, pl. 178.

⁵ *Hollingsworth v. Stennett*, 2 Esp. 716.

⁶ *Smith's L. & T.* 17; Co. Litt. 55 a; Cole on Ejectment, 448, 552.

⁷ *Davies v. Thomas*, 6 Exchq. 858; *Anderson v. Midland R. R. Co.* ante.

must have been an occupancy of the premises by him *as tenant to the plaintiff*, by his permission or sufferance.¹ If there was an occupancy merely, as the tenant of another person, as, under the lessee of the plaintiff, and there had been no express substitution of tenants, this form of action will not lie,² and such substitution is not wrought, even though the tenant *agrees* to pay the rent to the landlord, so long as there is a lease outstanding in favor of the person under whom the tenant entered, unless the lease has been assigned to him, or the lessee has assented to the tenant being substituted in his place,³ or if the defendant was in possession as a trespasser, and holding *adversely* to the plaintiff, no recovery for the use and occupation of the land, as such, can be had. He is not a tenant in any sense, but a mere trespasser, against whom a recovery can only be had as for a tort.⁴

SEC. 15. How a tenancy at will may be created.—Leases for an uncertain time, are *prima facie* leases at will.⁵ A reservation of rent is not essential to uphold a tenancy of this character, as a person who occupies, rent free, by the sufferance of the owner, may occupy that relation,⁶ or one

¹ Marwood v. Waters, 13 C. B. 820; Hyde v. Moakes, 5 C. & P. 42; Cripps v. Blank, 9 D. & R. 480; Churchwarden v. Ford, 2 H. & N. 449; Tew v. Jones, 13 M. & W. 12; Litchfield v. Ready, 5 Exchq. 539; Turner v. Coal Co., 5 id. 932.

² Phipps v. Sculthorpe, 1 B. & Ald. 50; Hyde v. Moakes, ante.

³ Hyde v. Moakes, ante. But the rule is otherwise where the defendant enters under the plaintiff, as tenant instead of another whose term has not fully expired. Phipps v. Sculthorpe, ante.

⁴ In Tew v. Jones, 13 M. & W. 12, the defendant conveyed to the plaintiff an undivided moiety of five houses, and he continued to occupy one of them after the conveyance. The court held that this afforded no evidence of a tenancy of any kind, and that no recovery for use or occupation could be had. In such a case, the only remedy is, either in ejectment, or by an action for not delivering the possession.

Churchwarden v. Ford, 2 D. & N. 449.

⁵ Rich v. Bolton, 46 Vt. 84; Jackson v. Bradt, 2 Cal. (N. Y.) 169; Larned v. Hudson, 60 N. Y. 102; Jones v. Shay, 50 Cal. 508; Richardson v. Langridy, 4 Taunt. 128; Rae v. Lewis, 2 W. Bl. 1178.

⁶ Rex v. Jobling, 2 Ross. C. & M. 28; Rex v. Collett, R. & R. (C. C.) 498; Nicholl v. McKing, 10 B. & C. 721; Jones v. Jones, 10 B. & C. 718; Rex v. Fillogley, 1 T. R. 458. Thus, where the owner permits a person to occupy premises without any lease or agreement to pay rent, and the occupier merely takes care of the premises for the owner, he is a tenant at will. Jones v. Shay, 50 Cal. 508; Herrell v. Sizeland, 81 Ill. 457. In Humphries v. Humphries, 3 Ired. (N. C.) L. 362, it was held that, where a person is put in possession of land without any agreement for rent, but with an express provision that he shall leave whenever the owner shall re-

who occupies, by the naked permission of the owner,' or one who enters without permission, even as a squatter, disclaiming title,' or a person who holds under a void deed or lease,' or who enters under a contract to purchase' or

quire him to do so, he is strictly a tenant at will, and not entitled to notice to quit. In *Whoon v. Drizzle*, 8 Dev. (N. C.) L. 414, the owner of land agreed that A should cultivate it during his life, or as long as he pleased, with a restriction as to the sale of it, and it was held that only a tenancy at will existed.

¹ *Hull v. Wood*, 14 M. & W. 682; *Williams v. Deriar*, 81 Mo. 13; *Jones v. Shay*, 50 Cal. 508; *Larned v. Hudson*, 60 N. Y. 502. A mere general letting, *Richardson v. Langridge*, 4 Taunt. 132; *Roe v. Lees*, 2 W. Bl. 1178, or a simple permission to occupy unless there is an evident intention to create a tenancy from year to year, or some other term, create a tenancy at will, *Hull v. Wood*, ante; *Doe v. Gardiner*, 12 C. B. 319, so a *cestui que* trust in the actual possession by the consent or acquiescence of the trustee is a tenant at will; but merely receiving the rents, does not make him so, *Melling v. Leak*, 16 C. B. 652. The fact that a person pays rent, does not change the character of the tenancy, unless he pays it with reference to a yearly holding. *Bastow v. Cox*, 11 Q. B. 122; *Anderson v. Midland Ry. Co.*, 3 E. & E. 614; *Cox v. Bent*, 5 Bing. 185; *Braithwaite v. Hitchcock*, 10 M. & W. 497; *Hull v. Wood*, ante; *Rich v. Bolton*, ante.

² In *Stamper v. Griffin*, 20 Ga. 312, this doctrine was held and the squatter was held to become a tenant at will to the true owner; and in *Gay v. Mitchell*, 35 Ga. 159, it was held that he could not defeat the tenancy by secretly attorning to another. The same doctrine has also been held in Alabama, *Smith v. Houston*, 16 Ala. 111; *Weaver v. Jones*, 24 Ala. 420.

³ *Ezelle v. Parker*, 41 Miss. 20. Leases; *Cromelin v. Thies*, 31 Ala. 412; *Galloway v. Herbert*, 4 T. R. 680; *Warren v. Fearnside*, 1 Wils. 176; *Medina v. Polson*, Half. 47. In Tennessee, where a parol lease for two years is void,

a tenant entering under it is held to be a tenant at will, *Duke v. Harper*, 6 Yeng. (Tenn.) 280, and in Maine, a parol lease at an annual rent creates a tenancy at will. *Wethers v. Larabee*, 48 Me. 570; *Cole on Ejectment*, 456; but he holds, subject to the terms of the lease in all other respects, except as to duration of the term. *Riggs v. Bell*, 5 T. R. 471; *Tress v. Savage*, 4 E. & B. 36; *Richardson v. Gifford*, 1 Ad. & El. 52; *Pennington v. Taniere*, 12 Q. B. 998; *Lee v. Smith*, 9 Exchq. 662; *Arden v. Sullivan*, 14 Q. B. 832, but upon payment of rent, he becomes a tenant from year to year, under the terms of the void lease so far as they are applicable to, and not inconsistent with, a yearly tenancy. *People v. Rickert*, 8 Cow. (N. Y.) 226; *Strong v. Crosby*, 21 Conn. 398; *Schuyler v. Leggett*, 2 Cow. (N. Y.) 660. But see *Jackson v. Rogers*, 1 John. Cas. (N. Y.) 83, where a tenant who went into possession under a void lease was held to be a mere trespasser, and not entitled under the statute to a notice to quit. *Goodtitle v. Herbert*, 4 T. R. 680; *Denn v. Fearnside*, 1 Wils. 176.

⁴ *Patterson v. Stoddard*, 48 Me. 355; *Proprietors, &c. v. McFarland*, 12 Mass. 325; *Jones v. Jones*, 2 Rich. (S. C.) 542; *Manchester v. Doddridge*, 3 Que. 860; *Stanway v. Rock*, 6 Jur. 266. Considerable confusion exists in the cases as to the true relation between the owner and occupier during the pendency of a contract to purchase. Some of the cases hold that, whether the contract is completed by a conveyance or not, no tenancy exists, *Carpenter v. United States*, 6 Ct. of Cl. (U. S.) 157. But while it is true that the relation of landlord and tenant does not exist in its full sense, or to the extent that rent may be recovered unless specially so agreed, yet, there would seem to be no question but that the relation in a *restricted or limited sense*, does exist. The con-

who enters under an agreement for a lease, which is not executed 'or under a lease of premises, until they are sold,' or a person, who, with the consent of the purchaser, remains in the possession of premises after they have been sold under an execution against him,' or a squatter who remains in possession after a conveyance by him,' or a person who goes in under an agreement that he may occupy as long as he remains in the owner's employ,' or until a

tractee went in by the *permission* of the owner, and while from such permission alone a contract to pay rent cannot be implied, and the liabilities of strict tenancy are not incurred, yet, during the pendency of the contract, he certainly holds under the owner, and his possession cannot be adverse to him. Therefore he stands as a tenant at sufferance or will, and can be put out of possession by the owner, if from any cause the conveyance is not made without notice to quit. *Tucker v. Adams*, 52, Ala. 254, and is not entitled to crops planted by him if he is forcibly expelled before they mature. *Harris v. Frink*, 2 Lans. (N. Y.) 85. In *Ball v. Cullimore*, 5 C. M. & R., 753, the court says that if a party contracting for land be let into possession, he is tenant at will by implication of law. See also, holding the doctrine stated in the text, *Howard v. Shaw*, 8 M. & W. 118; *Right v. Beard*, 13 East, 210; ——— *v. Miller*, 5 C. & P. 595; *Doe v. Jackson*, 5 B. & C. 448; *Stanway v. Rock*, C. & M. 594; 4 M. & Gr. 30; 6 Jur. 266; *Tomes v. Chamberlain*, 5 M. & W. 14. If the sale goes off *from that time*, if he remains in possession, he still continues tenant at will, but from that time may be liable for use and occupation, for the purchase money, which was to be the compensation for his occupation, is then at an end. *Howard v. Shaw*, 10 L. J. Exchq. 336, by ALDERSON, B.—*Tew v. Jones*, 13 M. & W. 12; *Hearne v. Tomlin Peake*, 19; *Winterbottom v. Ingham*, 7 Q. B. 611; *Kirtland v. Paussett*, 2 Taunt. 145, but if the purchase is made, he cannot be made liable for his occupation prior thereto, unless there was an agreement to that effect.

Carpenter v. United States, 17 Wall. (U. S.) 489.

¹ *Braithwaite v. Hitchcock*, 10 M. & W. 494; *Emmons v. Scudder*, 115 Mass. 367; *Jackson v. Kingsley*, 17 John. (N. Y.) 158; *Dunn v. Trustees, &c.*, 39 Ill. 578; *Anderson v. Prindle*, 26 Wend. (N. Y.) 616; *Hollingsworth v. Stennett*, 2 Esp. 717. In *Anderson v. Prindle*, 23 Wend. 616, it was held that a person who enters under a parol agreement for a lease, the rent to be paid monthly, and refuses to accept the lease, becomes a tenant at will or by sufferance, and is liable to be ejected immediately, but that, if the landlord accepts rent from him, he becomes entitled, under the statute, to notice to quit. If the parol agreement was for a term exceeding one year, and therefore void under the statute of frauds, it was held that the tenancy created by the acceptance of rent, was from month to month, and that the tenant would be entitled to a month's notice to quit. See also *S. C. 19 Wend. (N. Y.) 891*; *Hammerton v. Stead*, 3 B. & C. 488; *Reynant v. Porter*, 7 Bing. 451.

² *Lee v. Hernandez*, 10 Tex. 137, but in such a case the tenancy cannot be determined by a merely colorable sale, as by a sale to the wife, that is, merely going through the forms of a conveyance, not intending to make a valid legal transfer of the title for a good consideration. *Ela v. Banks*, 87 Wis. 89.

³ *Nicholas v. Williams*, 8 Cow. (N. Y.) 18; *Jackson v. Sternterns*, 1 John. Cas. (N. Y.) 13.

⁴ *Currier v. Earl*, 13 Me. 216; *Jackson v. Aldrich*, 18 John. (N. Y.) 106.

⁵ *McGee v. Gibson*, 1 B. Mon. (Ky.) 105.

certain contingency happens,¹ and generally, without stopping to recapitulate all the special instances in which a tenancy at will may arise, it may be said that, in all cases where a person enters into the possession of the premises of another by his permission, no definite term of occupancy binding upon the parties being agreed upon, he is a mere tenant at will, and this, too, irrespective of the question whether he occupies, rent free, or pays rent therefor.² A mere permission and occupancy under it is sufficient to create this species of tenancy,³ and it may be created by express terms, or may arise by construction or implication of law. Thus, a lease of premises, whether in writing or by parol, "so long as the parties please," or at the lessor's "will and pleasure," is a lease at will,⁴ so a lease of premises reserving the new house, whenever the lessor chooses to occupy it, and at all other times to be used by the lessee, constitutes the lessee a tenant at will of such house.⁵ A tenant who holds over, pending a treaty for a renewal of the lease, is a tenant at will, and if the renewal is not effected, may be ejected without demand or notice;⁶ but in some cases, under such circumstances, the

¹ In *Ashley v. Warren*, 11 Gray (Mass.), 43, the tenant went into the possession of premises under an agreement that he might occupy as long as he "kept a good school." The court held that this was a tenancy at will, with a conditional limitation, not requiring entry or notice to terminate it, and that evidence that the tenant was deficient as a teacher in literary and scientific attainments was competent evidence of the contingency. But if the contingency does not happen, his right of occupancy continues, and the landlord cannot enter to expel him. *McGee v. Gibson*, 2 B. Mon. (Ky.) 353.

² In *Herrell v. Sizeland*, 81 Ill. 457, the defendant and his wife moved into a house by the owner's permission, and remained there, rent free, and took care of him until his death. They were held to be tenants at will. In *Rex v. Fillouby*, 1 T. R. 458, it was held that a person occupying, under a

permission given in those words, for it," followed by occupancy under "I give you a lease to enjoy as long as I please, and to take again when I please, and you shall pay nothing for it," was held to create a tenancy at will, and the relation of tenant so strictly, that by residence under it for forty days, the tenant acquired a settlement. In *Groves v. Groves*, 10 Q. B. 486, the defendant occupied the premises in question by permission of the owner or lessee, for about forty-four years, paying no rent therefor. He was held to have occupied as a tenant at will, and that he was precluded from setting up an adverse title in himself.

³ See cases cited in the last note; also *Hull v. Wood*, 14 M. & W. 632.

⁴ *Richardson v. Langridge*, 4 Taunt. 128; *Bartow v. Cox*, 11 Q. B. 122.

⁵ *Cudlip v. Rundall*, 8 Salk. 156.

⁶ *Hollingsworth v. Stennett*, 2 Esp. 717.

person holding over has been held a tenant at sufferance.¹ A tenant holding over after the expiration of his term, is a mere tenant at will, or by sufferance, but if the lessor accepts rent from him, his tenancy is thereby at once converted into a tenancy from year to year, upon the terms of the former demise, so far as they are applicable to his new relation.² In order to convert a tenancy for

¹ *Simpkin v. Ashurst*, 1 C. M. & R. 261.

² *Jackson v. McLeod*, 12 John (N. Y.) 182; *Wilde v. Cantillon*, 1 John. Cas. (N. Y.) 123; *Jackson v. Parkhurst*, 5 John. (N. Y.) 128; *Clayton v. Blakeley*, 8 T. R. 3. This question should not be lightly passed over, as it is one that has involved considerable conflict, and that even now is not satisfactorily settled in all the States. The difference, however, in the decisions of the courts, is referable to the difference in the language of the section of the statute of frauds relative to parol demise. Under the statute 29 Car. 2 c. 393, it is provided that all leases by parol, for more than three years, shall have the effect of leases at will only; and in England, under this statute, it is held that, notwithstanding this statute, a person holding under a parol lease for a longer term, as in our case under a parol lease for seven years, *Rigg v. Bell*, 5 T. R. 471; 2 *Smith's Leading Cas.* 72, and paying rent, although not deriving an interest in estate, commensurate in duration with that fixed in the lease, is nevertheless considered as holding upon all the terms of the agreement so far as they are applicable to a tenancy from year to year. *Richardson v. Gifford*, 1 Ad. & El. 52; *Beale v. Sanders*, 3 Bing 850, and in the cases last named the tenant was held bound by the covenants to repair. In the case last cited the defendants had for several years occupied and paid rent, as assignees, under a void lease. The lease contained a warrant on the part of the lessees to keep the buildings and premises in repair. The court held that the assignees were liable to repair to the end of the term, but that their liability to repair under this implied assumpsit, ceased with the termi-

nation of the term fixed in the lease. "Although the lease was void," said PARK J., "yet, as the defendants held the premises to the end of the term, and continued to pay the rent, they are liable to all the stipulations contained in the lease, in the same way as a tenant who holds upon the expiration of a void lease." This doctrine was also held in *Pistor v. Cator*, 9 M. & W. 315, in which the tenant entered into possession under an agreement for a lease as soon as the lord's license could be obtained, in which he was to covenant to repair. No lease was ever obtained, and no lease was ever made, yet he was held liable to repair so long as he occupied. In this case, however, it should be stated that the tenant occupied for the whole term agreed upon, and ABINGER, C. B., says: "The defendant having occupied for the whole of the term agreed upon, and having had the full benefit which he could have enjoyed under the lease, he cannot now say that the covenants are not binding because the lease was not granted. In all these cases, the tenant had the benefit of the full term. If the landlord had evicted him before the full term expired, as he might have done by giving proper notice to quit, a different question would have been presented, and possibly with a different result. In the case of such tenancies, the landlord may put an end to them at any time by notice to quit of the usual length. *Chapman v. Towner*, 6 M. & W. 100, but in any event it is put an end to by the determination of the term, without any notice to quit, and this is one of the peculiarities of this species of tenancy from year to year. *Tilt v. Stratton*, 4 Bing. 446; *Berney v. Lindley*, 3 M. & Gr. 511. The doctrine of these cases as to the occupancy

an uncertain period, into a tenancy from year to year, there

of a tenant, under a void lease being subject to the terms of the lease so far as they are applicable to the relation is generally accepted by our courts. *Lockwood v. Lockwood*, 22 Conn. 425; *Strong v. Crossly*, 21 id. 398; *Taggard v. Roosevelt*, 2 E. D. S. (N. Y. C. P.) 100; *People v. Rickert*, 8 Cow. (N. Y.) 227; *Creech v. Crockett*, 5 Cush. (Mass.) 138; *Hollis v. Pool*, 3 Met. (Mass.) 850; *Schuyler v. Leggett*, 2 Cow. (N. Y.) 680; *Edwards v. Clemmons*, 24 Wend. (N. Y.) 480; *Prindle v. Anderson*, 23 id. 616. But upon the point, that a tenant under a lease void under the Statute of Frauds, becomes a tenant from year to year upon payment of rent, there is a great diversity of doctrine, growing out of the difference in the language of the statute. In Massachusetts, in several cases under the statute of 1783, chap. 37, sec. 1, it is held that nothing more than a tenancy at will exists under parol leases, either for a certain or uncertain term, and that this tenancy cannot be enlarged into a tenancy from year to year by entry and payment of rent. *Ellis v. Paige*, 3 Pick. (Mass.) 45; *Hollis v. Pool*, 1 Met. (Mass.) 151; *Kelly v. Waite*, 12 id. 300; *Bingham v. Sprague*, 10 Pick. (Mass.) 102, and a similar doctrine has been held in Maine. *Davis v. Thompson*, 13 Me. 214; *Withers v. Larabee*, 48 id. 570, and in New Hampshire *Whitney v. Swett*, 22 id. 10, and in the latter State it is held that a tenancy shown by written receipts for rent to be from year to year, or month to month, is but a lease at will. *Whitney v. Swett*, ante, and a similar doctrine is intimated in *Cromelin v. Theis*, 31 Ala. 411. But in most of the States the English doctrine prevails. *Hull v. Wadsworth*, 28 Vt. 10; *Prindle v. Anderson*, 19 Wend. (N. Y.) 391, aff'd 23 id. 616; *Jackson v. Wilsey*, 9 John. (N. Y.) 267; *Ridgely v. Stillwell*, 28 Miss. 400; *McDowell v. Simpson*, 3 Watts (Penn.) 135; *Pugsley v. Aiken*, 11 N. Y. 491; *Porter v. Gordon*, 5 Yerg. 109; *Drake v. Newton*, 3 N. J. L. 111, and unless the language of the statute is such as to prevent such a

construction, it would seem to be the better doctrine that, while in the first instance such holdings are merely as tenants at will, yet the estate is susceptible of being enlarged into a tenancy from year to year, and that this is done, whenever a yearly rent is reserved in the lease, when the tenant pays, and the landlord accepts the rent. *Silby v. Allen*, 43 Vt. 172. In *Morris v. Niles*, 12 Abb. Pr. (N. Y.) 103, it was held that payment of a quarter's rent is evidence of a yearly tenancy at that rate. It seems that actual payment of the rent is not necessary, but in one case an admission by the tenant of a half year's rent in an account of the landlord was held sufficient. *Cox v. Burt*, 5 Bing. 185; *GOSSELER, J.*, before whom the case was tried at the assizes, saying, "The admission was equivalent to the paying of so much rent, and that the plaintiff thereby became tenant from year to year." See for English cases holding that a tenant under a void lease is a tenant from year to year, *Tress v. Savage*, 4 E. & B. 36; *Lee v. Smith*, 9 Exchq. 662; *Davenish v. Moffatt*, 15 Q. B. 257. Holding that a similar result ensues from an entry under an agreement for a lease, *Bolton v. Tomlin*, 5 Ad. & El. 856; *Doe v. Smith*, 1 Man. & R. 137; *Mann v. Lovejoy*, Ry. & Moo. 355; *Bennett v. Ireland*, E. B. & E. 326; *Knight v. Bennett*, 3 Bing. 361; *Chapman v. Towner*, 6 M. & W. 100; *Cox v. Burt*, 5 Bing. 185; *Braithwaite v. Hitchcock*, 10 M. & W. 494; *Doe v. Amey*, 12 Ad. & E. 476; although the agreement is void, *Knight v. Bennett*, ante; also that it arises from implication of law by payment of yearly rent. *Braithwaite v. Hitchcock*, ante; *Hull v. Wood*, 14 M. & W. 682; *Tress v. Savage*, ante; *Davenish v. Moffatt*, ante; *Doe v. Taniere*, 12 Q. B. 998. But, this is only an inference of law that cannot be raised against the intention of the parties clearly expressed, and it seems that it cannot arise where the tenant fails to comply with the conditions precedent, established either by contract, usage or law. Thus, in an Iowa case, *Dubuque v.*

must be a reservation of annual rent, and unless there is such a reservation the tenancy is *prima facie* only a tenancy at will.¹ Thus, in an English case,² the landlord let a shed to be used as a stable, for the dung that was made therein, as compensation. No definite term was agreed upon, and the court held that the tenancy was one merely at will, because there was no reservation of rent referable to a year, or any aliquot part thereof. And it seems that an implied obligation to pay rent, is not enough to convert a tenancy at will into a tenancy from year to year. Thus in a Vermont case,³ the defendant, by the parol permission of the plaintiff, went into possession of certain premises, as tenant, without any agreement as to the terms of holding, or the payment of rent, and continued in possession about fourteen years. He erected a barn on the premises, and repaired the house. The plaintiff tried to settle with him, but could get nothing from him beyond the repairs, and it appeared that he refused to pay rent. The plaintiff brought an action to recover the possession of the premises, giving no notice to quit. The defendant resisted the action upon the ground that his tenancy had ripened into a tenancy from year to year, and consequently that he was entitled to six months' notice to quit. But the court held that the tenancy was merely one at will, because it lacked the essential element of annual rent, and that the fact that the repairs upon the premises were to be allowed upon the rent, did not amount to a yearly payment of rent, but were merely payments in gross for the whole occupancy.

In Vermont, under the statute, a parol lease, with a stipulation to pay an annual rent, is an "estate at will" only, but it has been held in several cases, that the character of the tenancy may be changed, and become one

Miller, 11 Iowa, 583, the tenant of a market stall, under a lease for one year, from the city, at the close of the lease, held over without complying with certain terms as to the payment of rents made by the city for such second year, and the court held that his tenancy was only at

will.

¹Roe v. Lewis, 2 W. Bl. 1173; Jackson v. Brodt, 2 Cai. (N. Y.) 169; Rich v. Bolton, 46 Vt. 84; Chamberlain v. Dunham, 45 id. 50.

²Richardson v. Langridge, 4 Taunt. 128.

³Rich v. Bolton, 46 Vt. 84.

from year to year by subsequent acts of the parties ; as, by entry into possession by the tenant, and a payment by him, and an acceptance by the landlord of the rent stipulated to be paid, and continuing in possession beyond the first year,¹ *and this change is not wrought by the length of time that the tenant holds and pays rent, but by the fact that he enters and holds under a stipulation to pay annual rent, and pays accordingly.*² It has been held that an entry upon, and a continuance in, possession of premises for several years under a parol agreement to support the owner, creates a tenancy from year to year, because the support furnished is treated as in the nature of yearly rent.³ But in New Hampshire, as well as in all other States where the statute provides that no estate or interest in lands, except an estate at will, can be created except in writing, a tenancy from year to year cannot be raised from any occupancy, however long, or the payment of annual rent.⁴

It may be said that *prima facie* leases, indefinite as to the term, merely create a tenancy at will ; and only a reservation of annual rent converts them in leases from year to year.⁵ It is not essential that there should be stipulation for the payment of rent in money, or of a certain amount, but there should be a reservation of some benefit or advantage that stands as yearly rent.⁶ A lease, indefinite as to terms, but reserving an annual rent payable quarterly, is held in Pennsylvania to be a lease from year to year, and cannot be terminated except by regular notice to quit, and, if such notice is not given, and if the tenant commences a new year without any notice to quit having been given, the landlord cannot put him out until the end of the next year ; but for the second year the tenant must pay according to the terms

¹ Barlow v. Wainwright, 22 Vt. 88 ; Silsby v. Allen, 43 Vt. 172 ; Hull v. Wadsworth, 28 Vt. 410.

² Silsby v. Allen, 43 Vt. 172.

³ Hanchett v. Whitney, 1 Vt. 311.

⁴ Whitney v. Swett, 22 N. H. 10 ; Davis v. Thompson, 13 Me. 214 ;

Young v. Young, 36 Me. 133 ; Hollis v. Poole, 3 Met. (Mass.) 351.

⁵ Rich v. Bolton, 46 Vt. 84 ; Roe v. Lewis, 2 W. Bl. 1178 ; Jackson v. Brodt, 2 Cai. (N. Y.) 169.

⁶ Richardson v. Langridge, 4 Taunt. 128.

of the lease,¹ and the courts latterly are inclined to construe all leases at will at an annual rent, as leases from year to year.* But when the lease in terms creates only a tenancy at will, the fact that rent is reserved and paid in pursuance of such reservation does not change the character of the tenancy. The intention of the parties, if clearly expressed, will control. Thus, where a tenant entered under an agreement "to become tenant at the will and pleasure of" the landlord, "and at and after the rate of twenty-five pounds per annum, payable quarterly," the tenancy was held to be at will, and not from year to year. LORD DENMAN, C. J., said: "The courts are desirous to presume a tenancy from year to year *where the parties do not express a different intention*, but here they have expressed it."² In another case,³ it was

¹ Lesley v. Randolph, 4 Rawle (Penn.), 123.

² Pople v. Garland, 4 You. & C. 394. In many of the States all parol leases merely create a tenancy at will, as in Massachusetts, Maine, Vermont, &c.

³ Bartow v. Cox, 11 Q. B. 122. The reservation of yearly rent is not inconsistent with a tenancy at will, Co. Litt. 556; Walker v. Giles, 6 C. B. 662, and where the terms of the lease are such as to show a clear intention to create a tenancy at will, the reservation and payment of yearly rent, and an occupancy under it for a period of time, however long, will not change its character, Dixie v. Davis, 7 Exchq. 89. The English courts are inclined to hold tenancies for an indeterminate period, except where otherwise clearly provided, tenancies from year to year, where there is a reservation of annual rent, and even in some cases they have so held where there was no such reservation, but rent had been so paid, Parker v. Walker, 1 Wils. 25, and a similar doctrine was held in Jackson v. Bryan, 1 John. (N. Y.) 323, but this is only the case where there is nothing to indicate a contrary intention. When it is clearly the intention of the parties to create only an estate at will, their inten-

tion will be upheld, notwithstanding the reservation of an annual rent, Anderson v. Midland R. R. Co., 30 L. J. Q. B. 94; Stedman v. McIntosh, 4 Ired. (N. C.) L. 291; Humphries v. Humphries, 3 id. 363. In a Massachusetts case it was held that a written lease of a house at a certain rent per annum, payable "in monthly payments, otherwise, pro rata," for a term to begin "where said house is suitable to be occupied" by the lessee, and undefined in duration, except by a stipulation that if, after two years from the time when the lessee should move into the house, the lessor should wish to live there, he might do so, and the lessee might then retain, if he should desire, certain rooms "for such a time as may be agreeable to us both," creates only a tenancy at will; and parol evidence is inadmissible to give it a different construction, Murray v. Cherrington, 99 Mass. 229.

Where, by the terms of a written lease, the tenancy is to continue so long as the parties shall mutually agree, and either party may determine it on four days' notice—the rent to be paid monthly or semi-monthly, as may be most convenient—such renting creates a tenancy at will; and the lessee, in such case, acquires no

* Walker v. Giles, 6 C. B. 662.

held that a clause in a mortgage, that the mortgagors should become tenants to the mortgagees of the demised premises during their will, at a yearly rent, created only a tenancy at will.¹ This species of tenancy is of a precarious character, and the tenant is held not to be under any such liability to the landlord, as a tenant for a term.² Thus, it has

certain indefeasible interest in the premises which he can sell and transfer to another. Such tenancy will be determined by implication of law, upon the death either of the lessor or lessee; or by the desertion of the premises by the lessee; or by the sale and transfer of his possession to another. Therefore, where during such a tenancy the lessor died, having by will devised the premises; and the lessee, a month afterwards, sublet a portion of the premises to the plaintiff, without the consent of the devisee; and shortly thereafter removed wholly therefrom; and the devisee thereupon entered and removed doors and windows from a dwelling-house situated on the demised premises, and in the occupancy of the plaintiff; without unnecessary interference with the person or property of the plaintiff, and without a breach of the peace, such entry and acts of ownership were not tortious, and do not constitute a cause of action in favor of the plaintiff against the devisee. *Say v. Stoddard*, 27 Ohio St. 478.

¹ In *Dixie v. Davis*, 7 Exchq. 89, an indenture of mortgage, among other things, contained a proviso and covenant by the mortgagee, that no sale, or public notice, or advertisement for any sale, should be made or given, nor any means be taken for obtaining possession, until the expiration of twelve calendar months after notice in writing of such intention should have been given to the mortgagor, as tenant at will to the mortgagee, on the payment of a certain yearly rent, by two equal half yearly payments. No livery of seizin was made to the mortgagor. It was held that, under this provision, the mortgagor was tenant at will only to the mortgagee, and that a

tenancy from year to year was not thereby created. *POLLOCK, C. B.*, said: "There can be no doubt that a tenancy at will may be coupled with a yearly rent."

² In *Lothrop v. Thayer*, 138 Mass. 556, it was held that a tenant at will is not liable to his landlord for the destruction of the premises by fire by the mere negligence of the tenant. The court said: "The diligence of the counsel for the plaintiff has not shown us any case in which it has been held that a tenant at will is liable to his landlord for injuries occasioned by his negligence in kindling or keeping fires in stoves, fireplaces or chimneys, intended to be used for heating the premises. Such a case is presented in *Scott v. Hale*, 16 Me. 326, but the defendant had a verdict. In the case cited of *Parrott v. Barney*, 1 Deady (U. S. C. C.) 405, App., 1 Sawyer (U. S. C. C.) 435, the tenancy was from year to year, and the damage was for explosive substances stored in the building. There is nothing in *United States v. Bostwick*, 94 U. S. 53, or *Robinson v. Wheeler*, 25 N. Y. 252, that decides that a tenant at will is liable for the negligent burning of a building let. The law of negligence has been largely developed in recent times, and is argued that there is no sound reason why it should not be applied in the same manner to real property as to personal, and to tenancies at will as well as to tenancies for a term. It may well be doubted whether the existing condition of the law of negligence is altogether satisfactory and whether it would be well to establish an unlimited liability on the part of every tenant at will of real property to his landlord for every injury occasioned by any act of negligence on his part, or that of

been held in a recent case, cited in the last note, that the tenant is not liable to the landlord for the destruction of the buildings by reason of his negligence or the negligence of his servants. But to third persons, who know nothing of the terms under which he holds, his liability would be the same as that of any tenant. A tenant at will, whose term has been put an end to by the landlord between two term days, cannot be made liable for the rent as such tenant, as the rent can-

his servant in the use of the property. However this may be, we do not feel at liberty to overturn long-established rules of law governing real property. It is competent for landlords and tenants to make in writing any stipulation they see fit. When there is no writing, and the tenant takes the precarious estate of a tenancy at will, we think it has been generally understood that the tenant is not liable for the burning of the tenement let, occasioned by his negligence or that of his servant in the keeping of fires set for the purpose of, and in the places designed for, heating the premises so that they may be fit for occupation. The fact that no action can be found to have been maintained for this cause of action is strong evidence of this. The ancient law has been acquiesced in, and consciously or unconsciously the cost of insurance to the landlord, or the value of the risks, enters into the amount of the rent. We think on this part of the case the exceptions should be sustained. If the law were to be established anew, it might with much force be contended that the test of the liability of the defendants in this case ought to be the same as to all of the property destroyed, but it would deserve consideration whether in such a case as this is, it would not be more reasonable to hold the defendants liable only for gross negligence amounting to reckless conduct. The existing law has however introduced many distinctions. A bailee of chattels for hire is liable only for the want of ordinary care, but if the bailee promises to return the chattel abso-

lutely, then he is liable, although the chattel is destroyed by inevitable accident. *Harvey v. Murray*, 136 Mass. 377. The obligations of tenants under a written lease to their landlords, except as far as statutes have imposed arbitrary liabilities, are determined by the construction of the lease. But landlords are at common law exempt from many liabilities toward their tenants for the condition of the premises, which they are under toward strangers, who are lawfully upon the premises while in their possession. *Bowe v. Hunking*, 135 Mass. 380; *Woods v. Naumkeag Steam Cotton Co.*, 184 id. 357; 45 Am. Rep. 344. Disregarding the use of fire in clearing land and for other agricultural purposes, and confining ourselves to the case at bar, which is the use of fire in stoves for the purpose of heating the building, it is manifest that in many cases prudence might require a reconstruction of the chimneys and the purchase of new stoves. In many cases it would be difficult to determine how far the bad condition of the premises contributed to the injury occasioned by the fire. We think the reasonable rule is, that if landlords would protect themselves from the mere negligence of their tenants, they should take a written lease with proper covenants, and that a tenant at will is not liable to his landlord for the mere negligence of himself or his servants in kindling or guarding fires in stoves or chimneys for the purpose of heating the premises; that he is liable for willful burning, and also for such gross negligence as amounts to reckless conduct.

not be apportioned,¹ nor can a recovery be had against him as tenant by sufferance, because he was a tenant at will. ² Thus in a Massachusetts case³ the defendant was a tenant at will of premises in Boston, the rent days being January 1 and April 1, etc. On January 23, plaintiff conveyed a portion of the premises in fee to the city, defendant remaining in possession of the remainder. In an action for use and occupation of the premises, *held*, that the conveyance of a part of the land in fee by the plaintiff to the city determined the tenancy at will. ⁴ The tenant is not estopped to deny, that since his own entry into possession, his lessor's title has been determined by the act of the lessor. ⁵ It was held that the plaintiff cannot recover of the defendant rent from January 1 to January 23, when the conveyance to the city was made, because the conveyance of a part of the land to the city must be held to have determined the tenancy at will as to the whole land, it is in accordance with the principles of law to hold that after such conveyance and before entry by the plaintiff, the defendant is a tenant at sufferance to the plaintiff of the portion of the land remaining to the plaintiff. He cannot be a tenant at will of the plaintiff of that portion, because there never has been any agreement, express or implied, on the part of the plaintiff to let, and on the part of the defendant to hire that portion of the land. ⁶ The defendant cannot well be considered a trespasser merely from holding over after the determination of the tenancy at will by the plaintiff, for he came into possession by right. The defendant was held liable under a statute as tenant at sufferance to pay rent to the plaintiff from January 23, for the use and occupation of the portion of the land owned by the plaintiff after that time, but the amount of rent to be paid was held not to be determined by the proportion which such unconveyed portion bore to the whole estate,

¹ Fuller v. Sweet, 6 Allen (Mass.) 219; Dexter v. Phillips, 121 Mass. 178.

² Nicholson v. Munigle, 6 Allen (Mass.) 215.

³ Emmes v. Feeley, Mass.

⁴ McFarland v. Chase, 7 Gray, (Mass.) 462.

⁵ Lamson v. Clarkson, 113 Mass. 348.

⁶ Edwards v. Hale, 9 Allen, (Mass.) 462.

but the sum which the jury find the use and occupation of that portion for that time was reasonably worth.

SEC. 16. *Vendor and Vendee*—What relation exists between.—As previously intimated, some confusion exists in the cases, as to the nature of the relation existing between a vendee in possession under a contract to purchase, and the vendor. But, while in some cases it is held that the vendee is to be treated as a mere licensee,¹ yet, in a majority of the cases, and those entitled to the most weight as authority, it is held that the vendee is a tenant at will in a qualified sense, to wit, as owner,² the tenancy being raised by implication of law,³ and it has been held in several English cases that this relation must be determined by a demand for the possession before ejectment can be brought.⁴ "It is not the agreement," says

¹ Doolittle v. Eddy, 7 Barb. (N. Y.) 74.

² Towne v. Butterfield, 98 Mass. 106; Jones v. Jones, 2 Rich. (S. C.) 542; Proprietors, &c. v. McFarland, 12 Mass. 325; Carpenter v. United States, 17 Wall. (U. S.) 489; aff'g S. C., 6 Ct. of Claims (U. S.) 157; Winterbottom v. Ingham, 7 Q. B. 611; Milburn v. Edgar, 2 Bing. (N. C.) 498; Manchester v. Doddridge, 3 Ind. 360; Love v. Edmondston, 1 Ired. (N. C.) L. 152; Patterson v. Stoddard, 47 Me. 355; Hearne v. Tomlins, Peake, 192; Newby v. Jackson, 1 B. & C. 498; Hope v. Booth, 1 B. & Ad. 498; Kirkland v. Paunnett, 2 Taunt. 145.

³ Ball v. Cullimore, 5 Tryw. 753; Lewis v. Beard, 13 East, 210, "There is no doubt," said PARKE, B., in Gray v. Stanion, 1 M. & W. 700, "but that if there be an agreement to purchase, and the intended purchaser is thereupon let into possession, such possession is lawful, and amounts, at law, strictly speaking, to a bare tenancy at will."

⁴ Gray v. Stanion, 1 M. & W. 700; Lewis v. Beard, 13 East, 210; Stanway v. Rock, 4 M. & G. 80; Milburn v. Edgar, 2 Bing. N. C. 498; Newby v. Jackson, 1 B. & C. 448. If the landlord does that which is equivalent to a demand of possession, as, if he exercises

any act of ownership upon or over the land, as by entering and cutting down trees, or makes a feoffment or lease for years to commence immediately, the estate at will is determined, Ball v. Cullimore, 2 C. M. & R. 122; Howell v. Howell, 7 Ired. (N. C.) 496; Rising v. Stannard, 17 Mass. 282; Kelly v. Waite, 12 Met. (Mass.) 300; Keay v. Goodwin, 16 Mass. 1; Ellis v. Paige, 1 Pick. (Mass.) 43, a partition of the land, Rising v. Stannard, ante, the granting of another lease at will and giving seizin and possession to the lessee, Ellis v. Paige, ante, or the death of the landlord, Robie v. Smith, 21 Me. 114; Page v. Wright, 14 Allen (Mass.), 182, or by any act that determines the will under which the estate is held, Howell v. Howell, ante, LORD DENMAN, C. J., in Turner v. Bennett, 9 M. & W. 643, very forcibly expressed the true rule as to the effect of an entry by the landlord in the case of a tenancy at will. He said, "The intent of an entry is undoubtedly in many cases important, but in the case of a tenancy at will, whatever be the intent of the landlord, if he do any act upon the land for which he would otherwise be liable in an action of trespass at the suit of the tenant, such act is a determination of the will, for so only can it be

BARON PARKE,¹ "*but the letting into possession, that creates such tenancy, for the person suffered so to occupy cannot, on the one hand be considered as a trespasser when he enters, and, on the other hand, cannot have more than the interest of a tenant at will, the lowest estate known to the law.*"²

A tenant thus let into possession, cannot in the absence of an agreement to that effect, be charged for use and occupation, at least so long as the contract is in force³ whether the contract subsequently goes off in consequence of the fault of the occupier or of the owner of the estate.⁴ And this is so, even though he is to pay interest at a specified rate annually upon the purchase money.⁵ But

lawful, and not a wrongful act." LORD ABINGER, C. B., in *Ball v. Cullimore*, ante, says, "*A tenant at will has a mere scintilla of interest, which the landlord may determine by making a feoffment, with livery upon the land, or by a demand of possession.*" In *Ball v. Cullimore*, ante, one Richard Withers entered into a contract with his son Thomas Withers, to sell to him a certain estate for the sum of £5, and in pursuance of that agreement Thomas went into possession and remained in possession six or seven years, but at the expiration of that time, the father not having received the purchase money, at the plaintiff's request, agreed to sell him the land for £5, which the plaintiff paid and a feoffment was executed by the father with livery of seizin endorsed, and livery of seizin was made upon Thomas was off the land, but Thomas Withers disputed the possession of the land, and the jury found that he did not go off the land for the purpose of giving up possession. It did not appear that he had any notice of the determination of the will, but the court held that the feoffment with livery of seizin as stated determined the will. "I am entirely of the opinion," said PARKE, B., "that Withers, the son, was nothing more than a tenant at will. He had nothing more than a lawful possession; and must be considered as having that kind of legal title to the possession, which,

in law, is recognized as a tenancy at will. Then the father executes a feoffment, to the plaintiff, and livery of seizin is given. *I am clearly of opinion that the entry on the land to make livery of seizin determined the will; any act of that kind determines the will, whether the tenant knows it or not.*"

¹ *Gray v. Stanion*, 1 M. & W. 700.

² *Howard v. Shaw*, 8 M. & W. 118; *Ball v. Cullimore*, 2 C. M. & R. 120; *Kirtland v. Paunnett*, 2 Taunt. 145.

³ *Winterbottom v. Ingham*, 7 Q. B. 611; *In Re Banks*, 2 Law. M. & R. 452.

⁴ *Saunders v. Musgrave*, 2 C. & P. 294, LORD DENMAN, C. J., in *Winterbottom v. Ingham*, ante; *Tomes v. Chamberlain*, 5 M. & W. 15; *Bell v. Ellis*, 1 Stew. & P. (Ala.) 295.

⁵ In *Tomes v. Chamberlain*, ante, the defendant, upon the 22d of Feb., 1833, entered into a contract with the plaintiff to purchase of him a certain estate, and was let into possession forthwith, and was to pay interest on the purchase money at the rate of £5 per annum, until the purchase was completed, which was to be done by the 22d of the ensuing May. There was no evidence that any conveyance had ever been made or tendered, or that the plaintiff had taken any steps to complete the purchase. The defendant remained

where a yearly sum is reserved which is to stand as rent if the contract goes off, or as purchase money if the sale is completed, the relation of landlord and tenant is created, and the tenant is entitled to notice to quit.¹ So where a person goes into possession under a parol contract to purchase, *and advances the purchase money*, but subsequently refuses to accept a deed, it has been held that he thereby becomes liable to the vendor for use and occupation for the time he was *actually* in possession.

But while this doctrine has been sustained by the *dicta* of a few cases,² and was predicated upon the doctrine of an English case,³ yet, it is not believed that it can be regarded as expressive of the true doctrine as now held, either by the English or American cases. It is not apprehended that any distinction can be said to exist, because the purchase money is paid in advance, but that whether the purchase money is paid in advance, or not paid at all, if the contract goes off, the parties must be relegated to their contract, and that, unless there is something in the contract itself, for which a promise to pay for the benefi-

in possession and built upon the land. After the estate had been occupied several years by the defendant, the plaintiff brought ejectment against him. The defendant insisted that he was a tenant from year to year under the agreement, and that the stipulation for the payment of annual interest, must in law be treated as a stipulation for so much annual rent. But the court held that this stipulation for the payment of interest annually was clearly not in the nature of rent. "At law," said PARKE, B., "this is nothing more than an estate at will; there is a provision also for payment of interest, *but not by way of compensation for the occupation of the land*. The agreement for payment of interest is quite independent of the occupation of the estate. * * * He has nothing but the lowest estate known to the law, viz., an estate at will, which may be determined by demand, or by entry."

¹Saunders v. Musgrave, 6 B. & C. 524, disapproving S. C. 2 C. & P. 294. See, also, to same effect,

Gould v. Thompson, 4 Met. (Mass.) 224, also Anderson v. Midland R. Co., 30 L. J. Q. B. 94.

²Gould v. Thompson, 4 Met. (Mass.) 224. But, according to the doctrine of this case, his refusal to accept a deed determines the tenancy at will, and from that time he becomes a trespasser, and no longer liable for rent. Upon this point there are several English cases in full harmony with it, holding that where a contract is made for the sale of lands to be paid for in installments, and providing that if default is made therein, all previous installments paid shall be forfeited, and the vendor not compellable to convey, and the purchaser is let into possession and makes default, from the time of default the purchaser becomes a mere tenant by sufferance, Moore v. Lawder, 1 Stark, 308; Rogers v. Pullen, 2 Bing. N. C. 749.

³Clough v. Hosford, 6 N. H. 231; Alton v. Pickering, 9 id. 494; Whitney v. Cochran, 2 Ill. 210.

⁴Hull v. Vaughn, 6 Price, 157.

cial enjoyment of the property can be implied, an action for use and occupation cannot be maintained. In the absence of such circumstances, the vendee is treated as a naked tenant at will, and the payment of the purchase money is the only compensation that the vendor had any right to rely upon, for the vendee's occupation. If parties see fit to jeopardize their interest by entering into contracts in such a manner that they cannot be enforced, or so loosely that certain rights that ought to have been saved to them are lost, the law cannot be distorted to protect them against the consequences of their folly. The fault is not with the law, but with the parties. In fact, the doctrine of the Massachusetts case¹ is not sustained by the English case upon which it relied.² In the English case the action was not brought by the vendor, but was an action brought by the vendee *against* the vendor for the use and occupation of the premises, during the pendency of an action brought by the vendee against him for specific performance, which was subsequently decreed. The ground upon which the court proceeded in that case was, that the vendor got into possession by the vendee's permission, under a mistake of facts, and RICHARDS, C. B., held that the judge below erred in ruling that the action could not be maintained, because it was brought by one who had no right to the land, against one who had. He held that a person equitably entitled to the land was to be considered as the owner from the time of making the contract, *if specific performance was afterwards decreed*, and that the vendor, entering into possession by the *permission* of the vendee, if not indeed by practising a fraud upon him, was answerable to him for use and occupation. That is, *where a person enters into the possession of lands, with the permission of the owner, under such circumstances that it cannot be said that his occupancy was to be gratuitous, and the compensation therefor is not referable to any other consideration, the law will imply the requisite promise to uphold an action for use and occupation therefor*. But, where a vendee

¹ Gould v. Thompson, ante.

² Hull v. Vaughn, 6 Price, 157.

goes into possession under a contract to purchase, and there is nothing in the contract to indicate that anything is to be paid for such occupancy, the fact that he went in by the *permission* of the vendor, as a part of the contract, has no tendency whatever to create liability on his part for the use and occupation of such premises, *because the payment of the purchase money is the only compensation that, in the eye of the law, the parties had in contemplation*, and the law cannot imply a promise where the contract is express, and repels any such presumption; and the relation of landlord and tenant, to that extent, does not exist until the contract goes off by the default of one or both of the parties thereto.¹ It was formerly thought,

¹ Kirtland v. Pounsett, 2 Taunt. 145, in Howard v. Shaw, 10 L. J. Exchq. 336; Hearne v. Tomlin, Peake, 192; Right v. Beard, 13 East, 210. In Smith v. Stewart, 6 John. (N. Y.) 46, the defendant had been for several years in possession of lands belonging to the plaintiff, under a contract to purchase, and from time to time promised to pay the purchase money, but not having done so, the plaintiff brought assumpsit for use and occupation, against him. The court held that the action would not lay, as the relation of landlord and tenant did not exist, and that the defendant, by his refusal to perform, had become a trespasser, and in that character might be turned out and made responsible for the mesne profits; and the same doctrine has been held in numerous American cases, Vanderheuev. Storrs, 8 Conn. 203; Bancroft v. Wardwell, 13 John. (N. Y.) 489. In Bell v. Ellis, 1 S. & P. (Ala.) 295, the court laid down what would seem to be the correct doctrine. "The correct doctrine of the books," said the court, "is that this action upon an implied promise for rent will only be by virtue of the statute when the relation of landlord and tenant is preserved, and that this relation will be destroyed when the possession is held under a contract of sale, though that contract may be void, ineffectual to convey the premises, or even though the sale

is prevented by the purchaser himself." See also, to the same effect, Hough v. Birge, 11 Vt. 190; Brewer v. Conover, 18 N. J. L. 215, and even in Kentucky, where it has been held that assumpsit for use and occupation lies where a party goes in with the assent of the owner, and there has been a beneficial occupancy, it was held that the action would not lie where the party entered as a purchaser, because the relation of vendor and vendee, rather than that of landlord and tenant existed, and thus the presumption of a promise was directly repelled, Jones v. Tipton, 2 Dana (Ky.), 295. See also, Little v. Pearson, 7 Pick. (Mass.) 301. In the case of Winterbottom v. Ingham, 7 Q. B. 611, this question was carefully considered, and the doctrine settled in accordance with the statement in the text; LORD DENMAN, C. J., carefully reviewing the previous cases. In that case the defendant went into possession of an estate under a purchase at an auction sale, and held the premises pending an investigation. The contract was afterwards determined for want of title, and the court held that an action for use and occupation would not lie against the purchaser. LORD DENMAN said: "Upon the facts of this case, the plaintiff's counsel contended that by the contract of sale the defendant was not to be let into possession until the purchase money paid; that his entry

although not directly held, that the right to recover in such cases depended upon the question whether such occupation was beneficial to the vendee or not;¹ but this notion does not now prevail; but the right of recovery is made to depend upon the circumstance *whether there is anything in the contract that warrants the inference, that during the pendency of the contract the parties stood to each other in the relation of landlord and tenant, or merely in that of vender and vendee, or in other words, whether anything more than a naked tenancy at will existed.*²

therefore could not be referable to that contract, and his occupation not merely as purchaser, but that both entry and occupation must be referred to a distinct contract arising upon the ordinary implication, and involving the ordinary consequences as to the payment of compensation. But he admitted that the entry was because he was the contractor for the purchase, and that, if the contract had been completed, and so long as it was pending, this action could not have been maintained. The more correct view of these facts seems to us to be, *that the entry and possession were not upon an understanding that any compensation was to be made in the event which has arisen. The defendant certainly was considered, both by himself and the plaintiff, as purchaser, not as tenant, and the plaintiff cannot convert him into an occupier, liable to pay for his occupation.* * *

We think a negative must be put on the proposition that the defendant promised to pay, *because both parties understood that he made no such promise.* Parties may easily secure themselves by stipulating for the event of a non-completion of the purchase, in their contract of sale and purchase."

¹ In *Hearne v. Tomlin*, 1 Peake, 192, the defendant was permitted to introduce evidence to show that the occupancy had not been beneficial, and, although the plaintiff was not permitted to recover, yet from the observation of LORD KENYON that the occupation had not been productive of actual loss, although not beneficial to the defendant, and from the fact that

defendant was permitted to give evidence upon this point, it is evident that he regarded this as a material point. In *Kirtland v. Pounsett*, 2 Taunt. 145, it is evident that, if the occupation had been shown to have been beneficial, a recovery would have been permitted; and in the case of *Winterbottom v. Ingham*, 7 Q. B. 616, although LORD DENMAN seemed to question whether the circumstance would have any effect upon the question, yet he seemed to go upon the presumption that the occupation must be regarded as not beneficial, even though the jury found that it was. He said: "The jury have indeed found that the occupation was beneficial; but this statement is not without ambiguity. *It may have been beneficial, supposing that he actually had become the owner, by making a fair return of profits on all his outlay, and the amount of the proceeds during his actual holding.* On the other hand, he may have expended, as owner, in improvements, a sum much larger than a reasonable rent."

² *Right v. Beard*, 13 East, 210; *Howard v. Shaw*, 8 M. & W. 118; *Doe v. Jackson*, 1 B. & C. 448; *Tomes v. Chamberlain*, 8 M. & W. 14; *Parker v. Boulton*, 6 M. & S. 148; *Winterbottom v. Ingham*, ante; *Ball v. Cullimore*, 2 C. & M. & R. 120; *Stanway v. Rock*, Car. & M. 549; 5 Jur. 121; *Hugh v. Birge*, 11 Vt. 190; *Jones v. Tipton*, 2 Dana (Ky.), 295; *Little v. Pearson*, 7 Pick. (Mass.) 301; *Smith v. Stewart*, 6 John. (N. Y.) 746; *Vandenheuvel v. Storrs*, 3 Conn. 203; *Bell v. Ellis*, 1 Steu. & P. (Ala.) 295;

When, at the time a contract of purchase is entered into, the vendee is in possession as a tenant, the question as to whether, under the contract, his relation is changed from that of tenant to a mere vendee, depends upon the intention of the parties to be gathered from the contract, and the attendant circumstances; and the contract and the circumstances must be such as to overcome the presumption that a tenancy once shown to exist, continues until it is shown to have been determined, and it would seem that a contract of sale absolute in its terms, and which involves no contingency, has that effect. Thus, in an Alabama case,¹ a person who entered into possession under a lease for a definite term, subsequently entered into a contract with the administrator of his lessor to purchase the premises from him. In point of fact, the administrator had no power to sell the premises, and the contract was not performed by him. The court held that, upon the making of the contract to purchase, although void, the relation of the parties was changed from that of landlord and tenant to that of vendor and vendee, and that no recovery could be had from the vendee for the use and occupation of the premises under the contract. But where the contract is dependent upon contingency, as, if the tenant contracts to purchase, if the landlord "can make a good title," it is held that the relation of the parties is not changed by the contract until the purchase is actually consummated.²

Bancroft v. Wardwell, 13 John. N. Y.) 489.

¹ Bell v. Ellis, 1 Stew. & P. (Ala.) 295.

² In Gray v. Stanion, 2 M. & W. 695, the defendant occupied a house belonging to the plaintiff as tenant from year to year, and while so occupying, he entered into a contract with the plaintiff for its purchase, as follows: "1831, Sept. 2, Samuel Stanton purchases an estate in the parish of Corbey, bought of Robert Gray, at the sum of £100. Received on account 10s. Mr. R. G. is willing to let the sum lie by paying 4 per cent." The court held that as there was an

implied condition in the contract, that the vendor should make out a good title, the agreement for the purchase did not operate as a surrender of the tenancy by operation of law, and consequently that ejectment would not lay without notice to quit. It was insisted by the plaintiff's counsel that the contract for the purchase determined the tenancy. "It depends," said PARKE, B., page 697, "entirely on the effect of the agreement. *If it amounts to an agreement to purchase without any inquiry into the title, it may determine the tenancy; but if it is an agreement to purchase, provided a good title be*

Whatever may be the conflict upon the other points stated, it seems to be well settled that no recovery can be had for use and occupation while the contract of sale is unrescinded,¹ or if it is completed by a conveyance of the property,² or if the holding was adverse.³

SEC. 17. Right of tenants at will to crops, etc.—A tenant at will possesses no demisable estate in premises held by

made, can it be contended that the tenant was bound to pay the purchase money before the title was investigated? In delivering the opinion of the court, PARKE, B., said: "There is no doubt but that if there be an agreement to purchase, and the intended purchaser is thereupon let into possession, such possession is lawful and amounts at law, strictly speaking, to a bare tenancy at will. *Lewis v. Beard*, 13 East, 210. It is not, however, the agreement, but the letting into possession, that creates such tenancy; for the person suffered so to occupy cannot, on the one hand, be considered as trespasser, when he enters, and, on the other hand, cannot have more than the interest of a tenant at will, the lowest estate known to the law. But where the purchaser is already in possession as tenant from year to year, it must depend upon the intention of the parties, to be collected from the agreement, whether a new tenancy at will is created or not, and from what time. In this case, if the true construction of the agreement be, that from the date of it (or any other certain time) the defendant was to be absolutely a debtor for the purchase money, paying interest on it, and to cease to pay rent as tenant from year to year, a tenancy at will would probably be created after that time; and the acceptance of such new demise at will, would operate as a surrender of the interest from year to year, by operation of law. But if the agreement is conditional, only provided a good title should be made out, and to pay the purchase when that would have been done, and the estate conveyed, there is no room for implying any agreement to hold

as tenant at will in the mean time; the effect of which would be to absolutely surrender the existing term, whilst it would be uncertain whether the agreement would be completed or not. And this is strongly illustrated by supposing such an agreement to be made by a term or for a long term of years, of considerable value beyond the reserved rent; in which case, it would at once strike any one as impossible to give this effect to the agreement. In such a case no one would doubt but that the intention was that the lease should not be given up unless the purchase was completed. Is, then, the contract in question a contract of this conditional nature, to purchase for £100, provided a good title should be made and the estate transferred? We conceive that there is no doubt but that it is to be so construed; for, in the first place, in contracts for the sale of real estate, an agreement to make a good title is always implied. *Souter v. Drake*, 5 B. & Ad. 992; and, in the next, it is out of the question to suppose that this defendant meant to be obliged to pay the purchase money without some conveyance of the estate, although subject to a mortgage for the purchase money. For these reasons we think that the tenancy from year to year was not determined by the defendant's entering into this agreement."

¹ *Little v. Pearson*, 7 Pick. (Mass.) 801; *Beauchamp v. Vanderhennel*, 3 Conn. 203.

² *Carpenter v. United States*, 6 Ct. of Claims (U. S.) 157; *Aff'd* 17 Wall. (U. S.) 489.

³ *Little v. Pearson*, ante; *Wiggin v. Wiggin*, 6 N. H. 298; *Barton v. Birney*, 11 Pick. (Mass.) 1.

him 'except that he may, as against himself, create a tenancy by estoppel, but he does possess such an interest that he can maintain trespass against any person who interferes with his present possession, or case against any person who commits a nuisance or other injury affecting either the comfort or convenience of his enjoyment of the premises,' but not for an injury to the reversion, although he is in under a contract to purchase, which is subsequently consummated by a conveyance.' He may terminate his tenancy at any time he chooses to do so, even though the lease is expressed to be at the will of the lessor, but if he does determine the estate after he has planted a crop and before it is harvested, he thereby relinquishes all right thereto, and it belongs to the landlord; but if the lessor determines the estate after a crop has been planted or sown, the tenant is entitled thereto,'

¹ If a tenant at will does underlet, even in those States where, by statute, a notice to quit is required, in order to determine the tenancy, a notice to the under tenant will be sufficient. *Clark v. Wheelock*, 99 (Mass.) 14.

² *Foley v. Wyeth*, 2 Allen (Mass.), 185; *Hilburn v. Fogg*, 99 (Mass.) 11; *Bulwer v. Bulwer*, 2 B. & Ad. 470. A tenant at will cannot maintain an action against his landlord for advising and procuring a person to whom he has given a lease of the premises to eject the tenant; and evidence of the lessee's motives in ejecting the tenant is immaterial. *Groustra v. Bourges*, 141 Mass. 7.

³ *Foley v. Wyeth*, ante, where the tenancy has not been legally determined, he may maintain trespass against the landlord who enters without the tenant's assent, as in one case for entering and cutting off a pump upon the premises. *Dickinson v. Goodrich*, 8 Cush. (Mass.) 119.

⁴ Litt. s. 68; *Cole on Ejectment*, 448; *Smith's L. & T.* 17; 2 *Blackstone's Com.* 145; *Woodfall's L. & T.* 186.

⁵ In *Oland's Case*, 5 Coke, 116 a, the rule was well expressed, as it seems to exist at the present time. In that case a feme-sole was in

possession of lands *durante viduitate sua*, and having secured the lands, was married, and the question was, whether the husband or the lord of the manor should have the crop, and it was held that the lord should have it, *because it was determined by the lessee herself*. See, also, S. C. *sub. nom.*, *Oland v. Burdwick*, Cro. Eliz. 60; *Rolls' Abr.*, tit. Emblements, 10, p. 727. In *Bulwer v. Bulwer*, 2 B. & Ad. 470, a similar doctrine was held, and the tenant at will, who remained in possession after he had determined his tenancy by his own act, was held liable in trespass for cutting and taking away the crops. In that case the defendant had been the rector of the parish of Sall, and he resigned that living, on May 21st, and the plaintiff was presented June 4, and instituted to it July 7th, and afterwards inducted. The defendant retained possession until the following Michaelmas day, and cut the hay, corn, and other crops, which had been sown previously. The plaintiff had not taken actual possession, but it was held that the crops inured to him on his induction, and he was held entitled to recover, and he had a verdict for £188. A similar doctrine was held in *Moyle v. Lwer*, 2 Bulstr. 184,

unless the estate is determined, because it has expired by breach of some condition therein, or by its own limitation by the happening of a contingency upon which its duration depended,¹ or if "the estate is determined before severance by uncertainty, by the forfeiture of the lease or for a condition broken. So, if the lessor enters for a tort done, or by title paramount, or if the tenancy expires by limitation, the lessor shall have the crops."² If a feme-sole tenant at will marries and her husband sows a crop, but before it is harvested they are divorced, yet it is said that the husband shall have the crop, because the tenancy is determined by the judgment of law, rather than by the acts of the parties,³ and the same rule prevails where the tenancy is determined by the act of God, as, by death of the tenant or by the act of a stranger, or by

and the same rule is laid down in Digge, Chap. 2, pl. 2. *But if the crops are severed* before the lessee determines his estate, or if they are secured before his death, they, having vested in him by severance, pass to him or his estate. Gibson's Codex, Vol. I., p. 661. See also, Sheppard's Touchstone, 244; Finlayson's L. & T. p. 289; Debow v. Colfax, 10 N. J. L. 128.

¹ Oland's Case, 5 Coke, 116 a; 1 Rolles' Abr. 762; Oland v. Bardwick, Cro. Eliz. 461. In Bulwer v. Bulwer, ante, ABBOTT, C. J., said; "The general rule of law applicable to cases of this description is, that *where a tenant of land has an uncertain interest which is determined by the act of God, or the act of another, there he shall have the emblement; but that is not so when the tenancy is determined by his own act.* That is laid down in a variety of instances which will be found in Comyn's Digest, Vol. I., p. 661. As where the lessee surrenders, or a woman who is tenant *durante viduitate* marries, or the estate determines by forfeiture, condition broken, etc. *In all these cases* they are not entitled to emblements." See, also, Davis v. Thompson, 13 Me. 209; Shelbourne v. Jones, 20 id. 70; Davis v. Brocklebank, 9 N. H. 78; Debow v. Colfax, 10 N. J. L. 128. The

tenant is only entitled to such crops as were sown *before* the estate was determined. If the crops were sown after his estate was determined by notice, or otherwise, he is not entitled to the crop or the expense of manuring and preparing the ground. Stewart v. Doughty, 9 John. (N. Y.) 108; Prior v. Pickett, 21 Ala. 741.

² In Oland's Case it was said that "if a lease be made to one until he doth waste, and he sows the land and afterwards doth waste, he shall not have the emblements." See, also, 1 Rolles' Abr. 726. In some of the States, and especially is this so in New Jersey, Delaware and Pennsylvania, by the custom of the country, a tenant even under a lease for a *definite* term, is by the custom of the country entitled to the away going crops. That is, to all crops sown the autumn previous to the termination of his tenancy, Van Dover v. Everett, 5 N. J. L. 460; Templeman v. Biddle, 1 Harr. (Del.) 523; Stutz v. Dickey, 5 Binn. (Penn.) 285; Clark v. Harvey, 54 Penn. St. 142, but not crops planted or sown in the spring, Demi v. Bassler, 1 Penn. 224; Templeman v. Biddle, ante. See past EMBLEMENTS.

³ Oland v. Burdwick, Cro. Eliz. 461.

operation of law,¹ or in any manner otherwise than by his own act,² and he may enter upon the land for the purpose of cutting and carrying them away.³ But if the tenancy relates to agricultural lands he cannot take away the manure made upon the land,⁴ even though it is piled in heaps in the farm yard, and was made by his own cattle, from his own fodder.⁵ But the rule is otherwise where the manure is made upon premises not devoted to farming purposes,⁶ as in livery stables, or in any way not connected with agriculture.⁷ A tenant at will who has erected a building upon the premises, who does not remove it within a reasonable time after his tenancy has expired, or after notice and request to do so, loses his rights to the building and it becomes the property of the owner of the land.⁸

SEC. 18. *How determined.*—Either party may put an end to a tenancy at will at any time he pleases, and *instantly*,⁹ and without notice,¹⁰ unless, as is the case in

¹ Ibid.

See also, *Gould v. Webster*, 1 Aik. (Vt.) 409; *Bulwer v. Bulwer*, 2 B. & Ald. 471.

² *Bulwer v. Bulwer*, ante; *Davis v. Eyton*, 7 Bing. 154. It is laid down by Littleton, sec. 68, that "a lessee at will is entitled to emblements unless he determines his own estate, and though it is otherwise with a tenant for years who knows the end of his term," yet LORD COKE says, "This is not only proper to a lessee at will that, when the lessor determines his will, the lessee shall have the corn sown, etc. but to every particular tenant that hath an estate incertaine, for that is the reason which LITTLETON expresseth in these words, *Pur ceo que il nad aucun certaine ou sure estate.*"

³ *Kingsbury v. Collins*, 4 Bing. 202; *Hayling v. Obey*, 8 Exchq. 531, and for the purpose of carrying away his goods or other personal property. *Folsom v. Moore*, 19 Me. 252. In Maine, by statute, a tenant at will is entitled to emblements and reasonable time to remove his family and personal property, which is fixed at thirty days after notice to quit, after

which forcible entry and detainer will lie. *Davis v. Thompson*, 13 Maine, 208. See also, *Davis v. Brocklebank*, 9 N. H. 73. In New Jersey, in *Debow v. Colfax*, 10 N. J. L. 128, it is held that, if a tenant has an uncertain estate in lands which may continue until the seed which he sows may grow and ripen for harvest, he may enter and reap the crops although his tenancy has before that time been determined by the act of God or of the law, but not if the estate was determined by his own act.

⁴ *Perry v. Carr*, 44 N. H. 118; *Daniels v. Pond*, 21 Pick. (Mass.) 367.

⁵ *Lassell v. Read*, 6 Me. 222; *Plumer v. Plumer*, 30 N. H. 558; *Middlebrook v. Corwin*, 15 Wend. (N. Y.) 169.

⁶ *Needham v. Allison*, 24 N. H. 355.

⁷ *Daniels v. Pond*, ante.

⁸ *Sullivan v. Carberry*, 67 Me. 531.

⁹ *Smith's L. & T.* 17; *Co. Litt.* 55 a; *Cole on Ejectment*, 448 552.

¹⁰ *Mizner v. Munroe*, 10 Gray (Mass.) 292. In an English case that is entitled to great consideration, *Ball v. Cullimore*, 2 Cr. M. &

several States, the statute requires that notice should be given by the party determining the estate, either of a certain number of days or reasonable notice, ' and in the case of a *strict* tenancy at will, it is held in England that ejectment will not lie until there has been a demand of possession ' or the estate has been determined by implication of law by some act of a decisive character, done by the landlord, and that is the rule in this country, as a landlord cannot determine the estate except by some decisive act that irresistibly leads to the conclusion that it is no longer held by his assent. ' At the common law, this species of tenancy may be determined without notice by implication of law, and in any event it is safe to say that a tenancy at will may be effectually determined by a demand of possession, or by the express declaration of the parties, ' and this is held to be the case in those States

R. 121., which was an action of trespass by a grantee of the landlord for an entry made by a tenant at will, upon premises that had for a long time been in his possession as tenant at will under an unperformed contract to purchase, the landlord, the contract not having been performed by the defendant, made a conveyance of them, with livery of seizin to the plaintiff. No notice was given to the defendant, and he subsequently entered upon the premises, and the question was whether the conveyance of itself operated such a termination of the will, that an entry upon the land under it by the plaintiff, when the defendant was casually off the premises, gave him lawful possession thereof. The court held that it did. "Any mode," said LORD ABINGER, C. B., "by which the will was determined, would entitle the father (the landlord in this case) to maintain ejectment. * * The general rule of law that any act done upon the land by the lessor *in assertion of his title* to possession determines the will, is a sufficient ground for us to say that this feoffment and livery of seizin *did* determine it." "Any act of that kind," said PARKE, B., "determines the will, *whether the tenant*

knows it or not." At the common law, no notice of the termination of this species of tenancy is required, but, by implication of law, it might be instantly determined by either party by any act that clearly evinces a termination of the will, but in all such cases he is entitled to a reasonable time to remove his family and personal effects, and, as to what is a reasonable time is a question of law dependent upon the circumstances of each case. *Ellis v. Paige*, 1 Pick. (Mass.) 49. In New Hampshire, a similar doctrine is held, *Davis v. Brocklebank*, 9 N. H. 73, and in Maine, by statute, the tenant is given thirty days for this purpose. *Davis v. Thompson*, 18 Me. 209.

¹ *Mizner v. Munroe*, 10 Gray (Mass.) 292, and as to what is reasonable notice is a question dependent upon the peculiar circumstances of each case. *Ellis v. Paige*, 1 Pick. (Mass.) 49.

² *Cole on Ejectment*, 58, 453; *Woodfall's L. & T.* 186.

³ *Ball v. Cullimore*, 2 Cr. M. & R. 120; *Rising v. Stannard*, 17 Mass. 282; *Howell v. Howell*, 7 Irmed. (N. C.) L. 496.

⁴ *Woodfall's L. & T.* 188; *Bartow v. Cox*, 11 Q. B. 123. See note 4, ante.

where the statute requires notice of the determination by either party to be given to the other.¹ So, too, the tenancy may be terminated by implication of law. As by a conveyance of the premises by the landlord,² the making of a new demise to commence presently,³ by the death of either party,⁴ by the tenant's disclaimer of the landlords' title even by parol,⁵ by his authority,⁶ or entering into an agreement with the landlord for the purchase of the premises,⁷ or by a commission of waste by him upon the premises.⁸ So, the estate is determined if the tenant

¹ Mizner v. Munroe, ante.

² And this is the effect of a conveyance, whether the tenant had notice of it or not. Ball v. Cullimore, ante; and even though it was made for the purpose of getting rid of the tenant, Curtis v. Galvin, 1 Allen (Mass.) 215, unless the lease runs until the landlord sells the premises, in which case, unless the conveyance is *bona fide*, it will not determine the tenancy, Ela v. Banks, 87 Wis. 89.

³ Disdale v. Ives, 2 Lev. 88; Mizner v. Munroe, 10 Gray (Mass.) 290. In Kelly v. Waite, 12 Met. (Mass.) 800, and also in Howard v. Morris, 5 Cush. (Mass.) 563, it was held that an alienation of the premises, or a re-letting of them by the landlord, either in fee or for years, operated *ipso facto* as a determination of the will, although the tenant had no notice thereof, but, that the tenant could not be made a trespasser for acts subsequently done by him upon the premises before he had notice of the determination of tenancy by those acts. See also, Davies v. Thomas, 6 Exchq. 854; Ball v. Cullimore, 2 Cr. M. & R. 120; Goody v. Carter, 9 Q. B. 863; Cole on Ejectment, 452.

⁴ Stanway v. Roch, 4 M. & Gr. 30; Atty. Genl. v. Lord Faley, 2 Dick. 663; Crockerell v. Owerell, Holt 417; James v. Dean, 11 Vis. 391; Rising v. Stannard, 17 Mass. 284; Ellis v. Paige, 1 Pick. (Mass.) 43; Cody v. Quarterman, 12 Ga. 386; Robie v. Smith, 21 Me. 114; Camp v. Camp, 5 Conn. 291; Paige v. Wight, 14 Allen (Mass.) 183; Co. Litt. 57 b. But the English Courts are now inclined to hold that the death of the landlord does not *per se*

dissolve the tenancy, but that the question whether it shall continue or not depends upon the action of the heirs or those entitled to the reversion, Morton v. Woods, L. R. 4 Q. B. 806.

⁵ DeLancy v. Ganong, 9 N. Y. 9; Montgomery v. Craig, 5 Dana (Ky.) 101.

⁶ Rising v. Stannard, 17 Mass. 284; Warren v. Fearnside, 1 Wils. 176; Co. Litt. 55 b.

⁷ Daniels v. Davison, 16 Ves. 249.

⁸ Cole on Ejectment, 449; Co. Litt. 55 b. But this must be understood as applying only in case of *voluntary* waste, for merely *permissive* waste, for which no action lies against him, the tenancy is not determined, Countess of Shrewsbury's Case, 5 Coke 13 b. LORD COKE, in Co. Litt. 57 a, says: "For *permissive* waste by a tenant at will, the lessor has no remedy at all, for the statute of Gloucester extends not to tenant at will." From this, and what is said by LITTLETON, sec. 71, that "*the lessee at will is not bound to sustain or repair the houses as tenant for term of years is tied*," it might be inferred that an action for *permissive* waste would lie against tenant for years, and SERGT. WILLIAMS in his note to Pomfret v. Ricroft, 1 Saund. 323 b. inclines to the same opinion; but Gibson v. Wells, 1 N. R. 290; Herne v. Benbow, 4 Taunt. 764; Jones v. Hill, 7 id. 392, hold the contrary. There are, upon the other hand, some old cases holding that a tenant for years who has demised to tenants at will, may have an action against such tenants at will for *permissive* waste, because they (the tenants for

demises, leases or assigns the premises over ;' but such demise or assignment does not determine the will to the prejudice of the landlord. That is, the landlord may treat it as a determination of the tenancy or not at his election,' and in any event it is not a determination of the tenancy as to the landlord unless he has notice of the facts,' and until such notice is given, the landlord may distrain for the rent against the tenant.' So, any act done by the tenant inconsistent with an estate at will, determines his tenancy.' Any act of ownership exercised upon the land by the landlord which is inconsistent with an estate at will, operates as a determination of it,' and this is so without any reference to the landlord's intention in doing them. "The intent of an entry," says LORD DENMAN, C. J., ' "is undoubtedly in many cases important,

years) are answerable over in waste to their lessors, *Panton v. Isham*, 1 Salk. 19; *Cudlip v. Rundle*, Carth. 263. For a full statement of the rules applicable in these cases, see chap. on WASTE, post.

¹ *Melling v. Leake*, 16 C. B. N. S. 652; *Pinhorn v. Souster*, 8 Exchq. 763.

² *Cole on Ejectment*, 453; *Pinhorn v. Souster*, ante, and all the cases in which it is held that a demise by the tenant determines the will, are to be taken, subject to this qualification. Thus in *Birch v. Wright*, 1 T. R. 378, *BULLER, J.*, says "If a tenant at will leases, it determines the will;" or, again, "if a tenant at will grant over his estate, *though the grant be void* it determines his will." See, also, *Jones v. Clark*, Hard. 47; *Co. Litt.* 57 a. But these, as well as all other cases, are subject to the qualification that the landlord may elect to treat the acts of the tenant as a determination of the tenancy or not, unless the tenant has notified him of the facts, or that he has determined the estate. "Surely," said *MARTIN, B.*, in *Pinhorn v. Souster*, ante, in reply to a claim that a demise by the tenant determines the estate, "the determination of the tenancy must be at the election of the landlord," and in the final judgment in that case, the court held that a demise by the

tenant does not *ipso facto* dissolve the tenancy, nor unless the landlord elects to treat it as having that effect, or the tenant gives notice to the landlord of the demise, may still be treated as tenant. See, also, *Little v. Pallister*, 4 Me. 209, to same effect. In Massachusetts, by statute, a tenant at will is liable for rent until he has given the landlord notice of the determination of the tenancy by him. *Batchelder v. Batchelder*, 2 Allen (Mass.) 105.

³ *Carpenter v. Collins*, Yelv. 73; *Pinhorn v. Souster*, ante.

⁴ *Pinhorn v. Souster*, ante.

⁵ *Wallis v. Delmar*, 29 L. J. Ex. 276; *Moss v. Gallimore*, 1 Doug. 269; *Hinchman v. Isles*, 1 Vent. 247; *Pallen v. Brewer*, 7 C. B. N. S. 371; *Countess of Shrewsbury's Case*, 5 Coke, 13 b.

⁶ *LORD ABINGER, C. B.*, in *Ball v. Cullimore*, 2 Cr. M. & R. 123, or that indicates clearly to the tenant that he resumes, or intends to resume, possession of the estate, as by sending for the keys of the building, *Patten v. Brewer*, 7 C. B. N. S. 371, or that he does not desire the tenancy to continue. *Dinsdale v. Ives*, 2 Sev. 88, and resumes possession of and dominion over it. *Davis v. Turner*, 7 M. & W. 224; *Rising v. Stannard*, 17 Mass. 282.

⁷ In *Turner v. Bennett*, 9 M. & W. 643.

but in the case of a tenancy at will, whatever be the intent of the landlord, if he do any act upon the land for which he would otherwise be liable to an action of trespass at the suit of the tenant, such act is a determination of the will, for so only can it be a lawful and not a wrongful act." In pursuance of this principle it has been held that if the landlord enters upon the premises without the tenant's consent and cuts down trees,¹ or takes and carries away soil or stones, these acts *ipso facto*, determine the tenancy, unless they are specially reserved from the demise.² But a mere naked entry upon the premises, and declaring the tenancy ended, does not have that effect unless the tenant is present and hears, or has notice of, the words used,³ because the landlord has done no act inconsistent with the continuance of the tenancy. When the act is such as is inconsistent with the tenancy and is done on the land, it is immaterial whether the tenant is present or not, as it is presumed that he was there and knows it;⁴ but if the act is not inconsistent with the tenancy,⁵ or *if it was done off the land*, the landlord must give the tenant notice of the determination of the tenancy.⁶ A demand made for possession, or notice of the determination of the tenancy given to an under tenant of the lessee at will,⁷ or from the wife of an under tenant, or it would seem, of any person in charge of the premises for such under tenant, is sufficient, and determines the estate against the tenant, himself.⁸ No formal demand of possession is necessary. Anything said or written to the tenant, even though accompanied with a condition, that informs him that the landlord terminates the tenancy, will be equivalent to a demand. Thus, in one case⁹ the landlord's agent wrote the tenant "unless you pay what you owe me, I shall take immediate measure to recover the property," was held sufficient both as a de-

¹ Rising v. Stannard, 17 Mass. 282.

² Bennett v. Turner, 7 M. & W. 226; also 9 id. 643; Co. Litt. 55 b.

³ Cook v. Cook, 28 Ala. 660.

⁴ Ball v. Cullimore, ante; Carpenter v. Collins, Yelv. 73; Pinhorn v.

Souster, Exchq. 763; Cole on Ejectment, 452.

⁵ Cook v. Cook, ante.

⁶ Co. Litt. 55 b.

⁷ Clark v. Wheelock, 99 Mass. 14.

⁸ Blair v. Street, 2 Ad. & El. 329.

⁹ Price v. Price, 9 Bing. 356.

termination of the will and as a demand of possession to enable the lessor to maintain ejectment. ' Anything which amounts to a demand of possession, although not expressed in precise and formal language, is sufficient to indicate the determination of the landlord's will. And if the demand is coupled with a condition, it at once imposes upon the tenant the duty to act, and to comply with the condition, or lose his estate without further action on the part of the landlord.' The words "you must leave," addressed by the owner of the fee to the tenant, have been held sufficient. ' It has previously been stated that the estate is determined by the death of either party ; but this is not the rule when the premises are owned by two or more as joint tenants. In such case the death of one of the lessors, ' or if there are two or more lessees, the death of one of them, does not determine the tenancy. ' The marriage of a feme-sole tenant at will does not determine the tenancy, ' nor is a lease at will made by her when sole determined thereby, ' nor does a lease made by husband and wife determine by the husband's death, nor by the wife's death if the husband is tenant by curtesy, or otherwise take the estate. ' The bankruptcy of the landlord and the vesting of his estate in the assignee dissolves the tenancy from the time the tenant has notice thereof. ' The rights of tenants at will to crops, etc., have been previously stated, " but it may be added that if rent is payable monthly, quarterly or yearly, and the landlord puts an end to the tenancy *before* the rent becomes due, he loses the rent for the month, quarter or year that had not then become due. "

¹ A demand of possession without notice to quit is sufficient. *Rubb v. Maisey*, 8 B. & C. 767.

² *Price v. Price*, ante.

³ *Locke v. Matthews*, 13 C.B. N. S. 753.

⁴ *Henstead's Case*, 5 Coke. 10 b.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Henstead's Case*, ante.

⁸ Co. Litt. 53 b.; 1 Rolles' Abr. 361. *Estates (z)*, 5; *Henstead's Case*, 5 Coke, 10 b.

⁹ *Davies v. Thomas*, 6 Exchq. 854.

¹⁰ See ante, pp. 45, 46.

¹¹ *Anonymous*, Keilw. 65 pl. 6; *Carpenter v. Colins*, Yelv. 78; *Title v. Grovett*, 2 Ld. Rayd. 1008; *Layton v. Field*, 3 Salk. 222; *Parker v. Harris*, 4 Shad. 79; *Keyhly v. Bulkley*, 1 Sid. 338; *Leighton v. Theed*, 2 Salk. 418. See, also, *Cole on Ejectment*, 448; *Comyn's Digest*, tit. *Estates (H.)* 9; *Co. Litt.* 55 a. b. note 374; 2 *Blackstone's Com.* 146.

SEC. 19. Notice to quit.—The rule is well established, both in England and in this country, that a tenant at will is not entitled to notice to quit.¹ There is a class of cases holding that a tenant at will is entitled to notice to quit,² but it will be found upon an examination of most

¹ *Hollingsworth v. Stennett*, 2 Esp. 717; *Tilt v. Stratton*, 4 Bing. 446; *Right v. Baird*, 18 East, 210; *Knight v. Quigley*, 2 Camp. 505; *Rich v. Bolton*, 46 Vt. 84; *Chamberlain v. Donohue*, 45 Vt. 50. In *Sheldon v. Davy*, 42 Vt. 687, the defendant leased a slate quarry for a term of years, paying as rent the price per square, as stipulated in the lease. Subsequently he took possession of, and worked for several years, without the consent of the lessor, a part of the quarry outside the limits fixed in the lease, and the lessor during all that time accepted rent for the same, according to the provisions of the lease. It was held by the court the tenancy had not, under the circumstances, ripened into a tenancy from year to year, and that no notice to quit was necessary.

In *Hooton v. Holt*, 139 Mass. 54, it was held that a notice from A to B, a tenant at sufferance, to quit, dated January 30, 1883, after reciting that a lease had been given to A for the term of one year from January 29, 1883, notified B to vacate the premises "within two days from the above date," was sufficient. A verbal agreement by the owner of land that A may remain in possession during life, without paying rent, constitutes A a tenant at will, and his tenancy is terminated by the execution of a written lease of the land by the owner to a third person. If an action is brought against a tenant at sufferance, after a notice to quit has been given, and before the tenant has had a reasonable time to remove, this does not render the notice incompetent in evidence, but is a matter to be shown in defence. It is no cause for the abatement of an action by the lessee of a tenement against a tenant at sufferance, that, pending the action, the estate of the plaintiff has ceased in consequence of the foreclosure of

a mortgage, and the purchaser has brought an action against the tenant, which is pending.

In an action upon a written lease "for the term of one year, with privilege of two years more at lessee's option," if the lessee holds over and pays rent after the expiration of the first year, evidence is admissible to show that he did so, as a tenant at will under an oral agreement with the lessor, made before the execution of the lease. *Atlantic National Bank v. Demmon*, 139 Mass. 420.

A notice from A to B, a tenant at sufferance, to quit, dated July 3, 1886, and served between six and seven o'clock on the evening of that day, after reciting that A had "this day leased the tenement," notified B to vacate the tenement "by Monday, 6th day of July, current, by twelve o'clock, noon." In an action on the Pub. sts. c. 175, by A against B, to recover possession of the tenement, it appeared that it was occupied by B, a married man, and was in the second story. The judge who tried the case without a jury, found as a fact that the notice was sufficient in point of time. It was held that no error in law appeared.

In an action to recover possession of a certain tenement, if the plaintiff, who has received a written lease of the premises, notifies the defendant, who holds under an oral agreement to vacate the tenement on a certain day "by twelve o'clock, noon," and the writ is dated and the officer's return shows that it was served on that day, the officer may testify for the purpose of showing that the action was not prematurely brought, that he served it in the evening. *Wardell v. Etter*, 143 Mass. 19.

A notice to quit served upon one of two tenants in common is notice to both, *Grundy v. Martin*, 143 Mass. 279.

² *Ellis v. Paige*, 1 Pick. 43; *Par-*

of the cases, particularly those in the Term Reports, and that from Burrows, that the tenancy was really from year to year, and that an *annual rent* was reserved, while most of the others are referable to some statute that gave rise to the peculiar doctrine.¹ In Massachusetts, Maine, and many of the States, notice is required to be given either by the landlord or the tenant, in order to put an end to the tenancy, or some act must be done equivalent thereto, so that in determining whether notice to quit is required in a given case, reference must be had to the statute.

ker v. Constable, 3 Wils. 25; Jackson v. Wheeler, 6 John. (N. Y.) 271; Jackson v. Bryan, id. 822; Viner's Abr. Est. B. 3; Layton v. Field, 3 Salk. 232; Rising v. Stannard, 17 Mass. 282; Right v. Darby, 1 T. R. 159; Shore v. Porter, 3 id. 18; Riggs v. Bell, 5 T. R. 471;

Timmins v. Rawlinson, 3 Burr. 1603; Martin v. Watts, 7 T. R. 83.
¹ Tomes v. Chamberlain, 5 M. & W. 14; Jones v. Jones, 10 B D C. 718; Smith & Soden's Landlord and Tenant, 269; Creech v. Crockett, 5 Cush. (Mass.) 183; Miznar v. Munroe, 10 Gray (Mass.) 290.

CHAPTER IV.

MASTER AND SERVANT.

SEC. 20. Occupancy of master's premises by servant—relation thereby created.

SEC. 20. Occupancy of master's premises by servant—relation thereby created.—A person who occupies premises as the servant or agent of another for the more convenient performance of his duties, acquires no estate therein; is neither a tenant at will nor by sufferance, even though he is permitted to carry on an independent business therein,¹ and less wages are paid to him on that account.² “In such cases, and indeed in all cases where the possession is given for a special purpose, the transaction is treated as a license, and not as a lease,³ and does not confer any estate in the property to which it relates and is determined whenever the special purpose is accomplished.⁴ The occupancy

¹ *White v. Bayley*, 10 C. B. N. S. 227. In *McGee v. Gibson*, 1 B. Mon. (Ky.) 105, where a rent was reserved from his wages, the servant was treated as a tenant at will, but in an English case, *Hunt v. Colsen*, 3 Moor. Sc. 790, where a person who was employed as gate tender for the Highgate Archway Company, and lived in the toll house, and one shilling a week was reserved for his rent, and the company, having ceased to collect tolls at that place, dismissed him from their employ and notified him to leave the house, which he agreed to do, it was held that these facts did not constitute him a tenant.

² *Allen v. England*, 3 F. & F. 49; *Bertie v. Beaumont*, 16 East, 83; *Rex v. Stock*, 2 Taunt. 339; *Mayhew v. Suttle*, 4 E. & B. 347; *Rex*

v. Cheshunt, 1 B. & Ad. 473; *Rex v. Bandwell*, 2 B. & C. 161; *Rex v. Snape*, 6 Ad. & El. 278; *Rex v. Shipdam*, 3 D. & R. 384; *Rex v. Kelstern*, 5 M. & S. 136.

³ In *Wood v. Manley*, 11 Ad. & El. 34, property upon the plaintiff's land was sold to the defendant, and a part of the conditions of the sale were that the buyer was to be allowed to enter and take it. The court held that this operated as a license, and that the license was a part of the contract of sale and could not be countermanded. *Taylor v. Caldwell*, 3 B. & S. 826; *Jones v. Reynolds*, 4 Ad. & El. 805; *Hancock v. Austin*, 14 C. B. N. S. 634; *Watkins v. Gravesend, &c., Union*, 37 L. J. M. C. 33; *Ward v. Day*, 4 B. & S. 337.

⁴ *Coleman v. Foster*, 1 H. & N. 37.

of a servant of premises of the master for the more convenient performance of his duties, or as a mere remuneration for services, is in law the occupation of the master, and not of the servant,¹ and the relation of master and servant does not exist.² The rule may be said to be that, when a servant occupies a dwelling-house belonging to the master, or in the master's possession, as an accessory to the performance of his duties as such servant, and as a part of the consideration for the rendition of such services, as where A employs B to labor for him for one year, at \$20 a month, and gives him the use of a dwelling during the term, B's occupancy of the dwelling is that of a servant, and not as a tenant; and if he quits A's service before the expiration of the term, or if he is discharged therefrom by A, his right to the possession of the dwelling ceases, and he must surrender it up to A, or A may enter and forcibly eject him therefrom. The master, in such cases, has never parted with the possession of his premises, the servant's possession being regarded as the possession of the master; hence the master is not a trespasser if he enters forcibly and expels him with a strong hand.³ And when a servant is discharged, the master's right in this respect does not depend upon the question whether the servant is rightfully or wrongfully discharged, but exists in the one case as well as in the other, the master incurring the peril of paying damages for a breach of the contract if the discharge is wrongful; but, the right to expel the servant from the house exists whether he had good cause therefor or not.⁴

In the case referred to in the last note, the defendant (Haywood) was a farmer owning two farms several miles distant from each other, one of which was called the *upper* and the other the *lower* farm. On the 16th March,

¹ *Rex v. Cheshunt*, ante; *Bertie v. Beaumont*, ante; *Rex v. Kelstern*, ante.

² *Mayhew v. Suttle*, 4 E. & B. 347; *Doe v. Derry*, 9 C. & P. 494.

³ *Bertie v. Beaumont*, 16 East, 34; *Regina v. Rees*, 7 C. & P. 568; *Rex v. Stock*, 2 Taunt. 329; *Regina v. Ponsonby*, 3 Ad. & El. (N. S.)

14; *Rex v. Iken*, 2 Ad. & El. 147; *Rex v. Seacroft*, 2 M. & S. 472; *Rex v. Tynemouth*, 12 East, 46; *Haywood v. Miller*, 3 Hill (N. Y.) 90; *Kerrains v. People*, 60 N. Y. 221.

⁴ *Haywood v. Miller*, 3 Hill (N. Y.) 90.

1839, Haywood and Miller entered into a written contract, by which Miller agreed that he and his wife would labor for Haywood one year, "he (Miller) to labor on farm, etc.; and she (Miller's wife) to discharge the duties of house-keeper, etc.; term of labor to commence on the 1st of April, 1839." The contract further provided that Haywood should pay Miller for the services thus to be rendered, \$160. There was a dwelling-house on the lower farm, into which Miller and his wife moved on the 1st of April, 1839, taking with them their household furniture, and commenced their labor. Haywood aided in the removal. The court below allowed parol evidence to be given on the part of Miller, that the farm intended by the written contract, and on which he and his wife were to labor, was the lower farm.

In the course of the summer of 1839, Haywood desired Miller to perform some labor on the upper farm, which the latter declined. Differences arose between the parties, and Miller became irritated and threatened to injure some of Haywood's cattle. Haywood, becoming dissatisfied, gave Miller notice to leave his service, which Miller declining, Haywood entered the house and put Miller's furniture out of it.

The court charged the jury that neither Miller's refusal to work on the upper farm, nor his threats of injury to the defendant's property, constituted a violation of the written contract; that the lower farm being the one intended by the contract, it created tenancy for the year, and Haywood had no right to interfere with the possession of the house, or remove the goods. The plaintiff had a verdict for \$200.

Upon appeal, it was held by the court that the contract was not in the nature of a lease. Whether the lower farm was intended as the place of labor or not, the relation between the parties being merely that of master and servant, the court said: "True, it is assumed by the contract that the defendant below should furnish a house; and so does every master agree to furnish a house, or house-room, which is the same thing, for his domestic servants. It

does not follow that, when he becomes dissatisfied and gives his servant warning to depart, and the latter refuses, that the master may not turn the servant away and remove his goods. To be sure the master does this under the peril of paying damages for a breach of the contract with his servant, if he cannot show good grounds for dismissing him. But he is not a trespasser, whether he have good cause or not. Here the labor was to be on a salary of so much for the year. Suppose the plaintiff below had refused to work and held over the year, could the defendant have distrained for rent, or sued for use and occupation? Or could the plaintiff have had ejectment for the ouster within the year? Clearly neither, and that shows there was no more a tenancy created than there would be under any other retainer for a year's service."

A tenancy does not exist at all in such cases, nor does a tenancy at will spring up *at once* upon a termination of the service. In order to turn the servant's possession into a tenancy at will, the occupancy must be for such a period as to warrant an inference of a consent to a holding different from that under which the servant originally entered. The fact that a few days have elapsed since the service was terminated does not warrant such an inference, but any considerable delay would have such a result.¹ It is the duty of the employer to resume the control of his building within a *reasonable time*, or consent to the servant's occupancy will be presumed, and he will lose his right to enter and expel him by force. But as to what is a reasonable time, whether a day or a week, is a question to be determined by the circumstances of each case.² In the case last referred to, the employer consented that the servant might remain until his wife recovered from an illness with which she was suffering when the service ended, and it was held that this did not amount to such a consent as created a tenancy at will. In *Kerrains v. People*, ante, the service ended in the latter part of June, and the master did not expel the

¹CHURCH, C. J., in *Kerrains v. People*, 60 N. Y. 225.

²*Doyle v. Gibbs*, 6 Lans. (N. Y.) 180.

servant until the fifth of the following July, and it was held that the delay was not unreasonable, and did not change the character of the occupancy. The right of the master to enter forcibly, and the right of the servant to resist such entry, depends upon the nature and character of the occupancy—whether it is that of a servant or a tenant. If he holds as servant, the master may enter within a reasonable time after the period of service is ended; but if his occupancy is that of a tenant, the master cannot enter with a strong hand. In determining this question, the mere fact that the master owned the house, and that the right of occupancy ceased when the term of service expired, is not decisive,¹ nor is the fact that he does or does not pay rent therefor. Thus, in one case,² the claimant was a master ropemaker in a royal dock-yard, and, as such, had a house in the dock-yard for his residence. He had the exclusive use of the house, without paying rent therefor, as a part of his remuneration, no part of the house being used for public purposes, and it appeared that if he had not had the use of the house, he would have had an allowance in addition to his salary for the rent of a house. It was held that the occupancy was that of a tenant, and not as a servant. The real test seems to be whether the occupancy is for the benefit of the master and as an accessory or aid to the performance of his duties as a servant. The occupancy must in some way be *in aid of*, or *necessary to*, the performance of the service.³ “If,” says CHURCH,

¹ Kerrains v. People, ante.

² Hughes v. Chatham, 5 Man. & Gr. 54.

³ In Kerrains v. People, ante, the respondent had been for several years in the employ of Isaac Son, who was operating a paper mill at Chatham, Columbia county. He had lived in a dwelling-house belonging to the mill property. In January, 1871, they made a new agreement; this, as stated by Son on the trial, was that the prisoner was to work for him for a year if they could agree; Son to pay thirteen shillings per day, and to furnish

Kerrains with a house; the latter to work at whatever the former had for him to do, the same as he had for years before. As testified to by the prisoner, he was to work for Son for one year at thirteen shillings per day, he to have the same house and garden he had always occupied, with a provision that he was not to be required to “haul the bleach.” Kerrains worked for Son until the latter part of June, 1871, when Son requested him to “haul the bleach;” this he refused, and Son discharged him, paid him up, and told him to leave

C. J., in *Kerrains v. The People*, ante, "*the occupation is connected with the service, or if it is required, expressly or impliedly, by the employer for the necessary or better performance of the service, then it is for his benefit, and he continues in possession.*"¹

the premises or he would bring a force to throw his things out. Kerrains refused to leave. On the fifth of July, 1871, Son went to the house with two men and commenced removing Kerrains' furniture. The latter was absent at the time, but was sent for by his wife; he, returning, saw what was going on, went to the wood-house, picked up an axe and went into the house and ordered Son and the men out. Son refused to go, presented a pistol; an altercation occurred, during which Kerrains struck Son with the axe, inflicting a serious injury.

The court charged, among other things, in substance, that the prisoner occupied the house as servant, not as tenant; that Son had the right of possession, and to remove the prisoner with his effects, and to employ all the necessary force for that purpose.

The ruling of the court was sustained by the Court of Appeals, and CHURCH, C. J., in commenting upon the tests by which to determine the character of the servant's occupancy, said: "Each party relied upon the terms of the contract, with only the additional facts that the house was a part of the mill property, and had been occupied for several years previously by the prisoner while engaged as laborer in the mill. There was no request to submit the facts to the jury to determine whether the house was occupied to enable the prisoner the better to perform the service in which he was engaged; or, in other words, whether it was not occupied as an appendage to the mill, and really for the benefit of the owner; nor was there any evidence of an allowance for rent, but it was left to the court, upon the contract and facts before stated, to be determined as a question of law, and, in my judgment, the court decided correctly, that the defendant occupied as a serv-

ant, and not as a tenant. The inference from these facts is reasonable, if not irresistible, in the absence of any provision for an allowance for rent, that the house was intended to be occupied by an employee for the benefit of the owner in carrying on the mill. The case thus presented is analogous to that of a person employing a coachman or gardener, and allowing or requiring him to reside in a house provided for that purpose on the premises; or a farmer who hires a laborer for wages, to work his farm, and live in a house upon the same. In these cases the character of the holding is clearly indicated by the mere statement of facts. It is not impossible that other facts may exist to strengthen or weaken the inference that the prisoner occupied as a servant, and not as a tenant, but from the facts proved there was no error in holding that he occupied as a servant. Both parties regarded it as a question of law upon substantially undisputed facts, although there are cases where the character of the holding is so uncertain, from conflicting evidence or inferences which may be drawn, as to render it proper to submit the question to a jury."

¹ *People v. Annis*, 45 Barb. (N. Y.) 304; *Regina v. Spurrell*, L. R., 1 Q. B. 72; *Haywood v. Miller*, ante; *Kerrains v. People*, ante.

In *Hughes v. Chatham*, the facts in which are given ante, TINDAL, C. J., gave the rule for determining the character of the occupancy thus: "There is," said he, "no inconsistency in the relation of master and servant with that of landlord and tenant. A master may pay his servant by conferring on him an interest in real property, either in fee, for years, or at will, or for any other estate of interest, and if he do so the servant then becomes entitled to the legal incidents of the estate, as much as if

The question is, *whether it is subservient and necessary to the service.* The mere fact that the relation of master and servant exists, and that the servant occupies one of the master's rooms, without paying rent therefor, *as a part of his compensation*, is not of itself sufficient to establish a holding as a servant, but the occupancy must also be subsidiary, and necessary to the service. It must be *dependent upon and necessarily connected with the service*, for if it is independent or unconnected with the service, and not in aid thereof, although the house belongs to the master and no rent is paid therefor, or even though the house is hired by the master and he pays the rent therefor, the occupancy is that of a tenant, and the master cannot eject him at will.¹ If the occupancy is connected with the service, and in part payment of it, there is no independent occupation, and the occupancy is that of the master.² Generally, the character of the occupancy when there is no dispute as to the facts, is a question of law to be determined by the courts but when the evidence is conflicting, or the inferences from the facts are uncertain, the question is for the jury.³

it were purchased for any other consideration." * * * * *

"And, as there is nothing in the facts stated to show that the claimant was required to occupy the house for the performance of his services, or did occupy in order to their performance, or that it was conducive to that purpose more than any house which he might have paid for in any other way than by his services, and as the case expressly finds that he had the house as a part remuneration for his services, we cannot say that the conclusion at which the revising barrister has arrived, is wrong."

¹ The King v. Kelstern, 5 M. & S. 138.

² Rex v. Minister, 3 M. & S. 276; The King v. Stubbs, 2 T. R. 395; The King v. Kelstern, ante; The King v. Cheshunt, 1 B. & Ald. 473.

³ The King v. Cheshunt, ante. In Regina v. Spurrell, L. R., 1 Q.

B. 72, the appellant, John Spurrell, was tenant of a farm of 812 acres, together with a farm-house and premises, and a cottage adjoining, and forming part of the premises, but fifty yards or more from the farm-house, at one entire rent, such cottage being a separate and distinct tenement. The farm was co-extensive with the parish of Pudding Norton, and John Spurrell resided with his family and servants in the farm-house, which, excepting the cottage, was the only human habitation in the parish. The appellant, William Walker, was farming bailiff to Spurrell, and looked after the men. He was a weekly servant, and received 14s. a week, wages, and occupied the cottage (which was furnished with his own furniture), rent free, in part payment for his services. But for the cottage, his wages would have been higher. No poor rates were paid for the parish of

Officers or servants of the government, whether muni-

Pudding Norton, but Spurrell paid to the treasurer of the Walsingham Union, which comprises the parish, the county rate in respect of the farm, premises, and cottage.

The parish of Pudding Norton is an immemorial parish and rectory. The church is in ruins; the present rector was appointed in 1884, and receives the tithes.

On behalf of the appellants it was contended that William Walker was not a "substantial householder" within the meaning of the 43d Eliz., c. 2, s. 1. The court of quarter sessions gave the following judgment:

"We find that under the circumstances of this case both appellants were substantial householders within the meaning of the 43d Eliz., c. 2, s. 1, and we confirm the order subject to a case," etc.

The question for the court was, whether William Walker was a "substantial householder" within the 43d Eliz., c. 2, s. 1.

COCKBURN, C. J., delivering the opinion of the court, said: "I think a man cannot be a householder within the true construction of the statute, who has not an independent occupation. I do not think a man who occupies as servant, in which case the occupation is that of the master, can be said to be a householder in the proper sense of that term. But when we come to the question whether, upon the facts found by the sessions, we can say there was here the relation of landlord and tenant between the parties, or whether the occupation was simply the occupation of a servant, I think the facts are not sufficiently found, the most essential element in the consideration of that question being omitted, namely, whether this occupation was an occupation for the purpose of the service or not—whether it was necessary to the service or not. If the occupation of the servant be necessary to the service, then I think his occupation is the occupation of the master, although the remuneration which the servant receives is the less on account of his

having the advantage of premises or a house of the master for the purpose of his habitation. On the other hand, if the occupation be not necessary to the service, then the fact that the advantage of the occupation is part of the remuneration for the service, will not render that occupation less an occupation *qua tenant*, than it would have been if the man had paid rent. It may be that it happens to be convenient both to the master and to the servant, that the servant requiring some place of habitation shall, by agreement with the master, instead of receiving so much for his wages, out of which wages he would have to find himself a separate habitation, inhabit some premises of the master as part of the remuneration for his services; but it is only an equivalent for wages. He would be receiving in the one instance the whole amount of his wages; out of those wages he would have to find himself a habitation, for which he would have to pay rent; in the other he inhabits premises of his master, and instead of paying the master the rent, the master deducts it from the wages.

Although, therefore, the relation of master and servant happens to exist between the parties by a subordinate arrangement, and the servant occupies premises of the master rent free, as part of the wages that he would otherwise receive if he paid the rent, it does not follow, from the relation of master and servant happening to exist between the parties, that the occupation may not be an occupation of *qua tenant*, independent of the master. As I said before, the essential element in the determination of the question is, whether or not the servant simply occupies as part remuneration for his services, or whether the occupation is subservient to and necessary to the service. That is a question of fact that might very easily be ascertained by obtaining, from the parties concerned, evidence as to the terms on which the occupation of these particular premises takes place. It is a most essential

cial, state or national, are considered as *tenants*, if they are *permitted* to occupy houses or premises *as part* of their remuneration for their services, but if they are *required* to occupy them with a view to the more efficient performance of their duties, the occupation has relation to the office, and they are not tenants, but their right of occupancy ends with the termination of their official term.

matter that the sessions have either not inquired into, or, having inquired into, have not thought it es-

sential to state ; but it is essential we should have that before us.

CHAPTER V.

TENANCY FROM YEAR TO YEAR.

- SEC. 21. Distinction between, and tenancy at will.
- SEC. 22. How created.
- SEC. 23. Entry under agreement for a lease; effect of.
- SEC. 24. What covenants will or will not be implied.
- SEC. 25. Void lease. Payment of rent under the effect of.
- SEC. 26. Holding over and paying rent.
- SEC. 27. Determination of tenancy from year to year. When determinable.
- SEC. 28. Notice to quit. Where there is no express agreement.
- SEC. 29. Where there is an express agreement.
- SEC. 30. Period with reference to which notice must be given.
- SEC. 31. Admission by tenant.
- SEC. 32. Where tenant keeps possession after expiration of lease.
- SEC. 33. Where tenant enters under a void or parol lease.
- SEC. 34. Where tenant enters on different parts of demised premises at different times.
- SEC. 35. Where tenant enters between two quarter days.
- SEC. 36. When notice to quit is indispensable, and when not.
- SEC. 37. Form of notice.
- SEC. 38. By whom notice may be given.
- SEC. 39. Agents.
- SEC. 40. To whom given.
- SEC. 41. Mode of service.
- SEC. 42. Waiver of notice to quit.
- SEC. 43. Second notice to quit.
- SEC. 44. Acceptance of rent. Holding over.
- SEC. 45. What amounts to a disclaimer. By verbal disclaimer.

SEC. 21. Distinction between, and tenancy at will.—A tenancy from year to year differs from a tenancy at will in that the tenant has a lease for one year certain, with a growing interest every year thereafter, springing out of the original contract, and as parcel of it,¹ and in the no-

¹ *Cattley v. Arnold*, 1 J. & H. 651. A tenancy from year to year is not a continuous tenancy, but is regarded as commencing each year. If six months' notice to quit is not given, or notice for such a period as is required by statute, the tenancy continues, however, until such notice for its termination is given,

or there is a legal surrender of the premises. And this right enures to the benefit of the tenant's creditors. *Read v. Ridout*, 5 Taunt. 519. When a new year commences, the tenant's right to the premises for that year becomes fixed and certain. *Skaggs v. Elkus*, 45 Cal. 154. But, whether he holds under the

tice required to be given by the landlord or tenant, in order to put an end to the tenancy.¹ It is, strictly speaking, the offspring of a tenancy at will, and had its origin in the strong desire of the courts to protect tenants at will against being deprived of the crops sown, by the arbitrary termination of their estates, or, in other words, from the determination of the courts to uphold the just and equitable policy of allowing a tenant "who sows, to reap."²

terms of the former demise or not, depends upon the circumstance whether a new agreement has been entered into or seasonable notice has been given him that if he remains he does so upon certain different terms. *Hunt v. Bailey*, 39 Mo. 257. The *intention* of the tenant, in holding over, is not material, as the right of election, whether the tenant shall be treated as a trespasser or as a tenant, rests exclusively with the landlord, *Hemphill v. Flynn*, 3 Penn. St. 144; *Schuyler v. Smith*, 51 N. Y. 809; *Warner v. Brown*, 8 East, 167; but a contrary doctrine has been held in some English cases, *Jones v. Shears*, 4 Ad. & El. 832; *Lord v. Crago*, 6 C. B. 90, and seeming to make the question as to whether a tenancy from year to year exists, where the tenant holds over, dependent upon the *intention of the tenant*, and consequently a question for the jury; but the doctrine of these cases is repugnant to the principles upon which this species of tenancy rests, and which control it, and leaves it within the power of the tenant to terminate the tenancy at his option, without notice of his intention; and, as stated previously, it has been repudiated in this country, *Schuyler v. Smith*, ante; *Hemphill v. Flynn*, ante, and is not the rule in England. *Dunn v. Rathernel*, 112 Penn. St. 272; *Shipman v. Mitchell*, 64 Tex. 174; *Withrell v. Pitzold*, 17 Mo. App. 669; *Coudon v. Barr*, 47 N. Y. L. 113; *M. Prime v. League*, 66 Cal. 446. A tenant who holds over without the lessor's consent is held not to be a tenant at will.

¹ *Cole on Ejectment*, 29, 441; *Clark v. Smarbridge*, 7 Q. B. 957; *Thompson v. Maberley*, 2 Camp. 578.

² Mr. Smith's note to *Keech v. Hall*, 2 Smith's Leading Cases, 76. "This feeling," he says, "manifested itself during the earliest ages of our law, in the doctrine of *emblems*, which entitles a tenant at will to them after the determination of his tenancy by the landlord. Litt. Sec. 68." In *Martin v. Watts*, 7 T. R. 85, LORD KENYON says; "So long ago as the time of the year books, it was held that a general occupation was an occupation from year to year, and that the tenant could not be turned out without a reasonable notice to quit," to wit, a half year's notice. *Shore v. Porter*, 3 T. R. 18. In the latter case LORD KENYON said: "The tenancy from year to year, succeeded to the old tenancy at will, which was attended by many inconveniences, and in order to avoid them, the courts very early raised an implied contract for a year, and added, that the tenant could not be removed at the end of the year, without receiving six months' previous notice." *Leavitt v. Leavitt*, 47 N. H. 329; *Timmins v. Rawlinson*, 8 Burr. 1609; *Ellis v. Paige*, 2 Pick. (Mass.) 71 n. All general lettings are regarded as creating only a tenancy at will, and only ripen into a tenancy from year to year, when rent is paid with reference to a yearly holding, or the contract or circumstances are such as to raise such a tenancy. *Rich v. Bolton*, 46 Vt. 84; *Richardson v. Langridge*, 4 Taunt. 128; *Cattley v. Arnold*, 1 John. & H. 651. In *Braithwaite v. Hitchcock*, 10 M. & W. 497, PARKE, B. says: "Although the law is clearly settled, that, where there has been an agreement for a lease, and an occupation *without* payment of rent, the occupier is a mere tenant at

At the first view, leases from year to year appear to confer several distinct estates, but in fact, they give only one time of continuance. The law considers the lease with a view to the time which has elapsed, as arising from an estate for all the time that has elapsed, including the balance of the year, and with a view to the time to come, as a lease from year to year. The reason for this is, that as all the time that the land may be held under a running lease is originally given, and in effect passed by the same instrument, the whole time is consolidated, and every year, as it commences, forms a part of the term.¹ The term is treated as recommencing each year, and may be set up in the pleadings as having commenced upon the first day of the current year, although the tenant has in fact occupied for several years previously,² and, except where the terms of the holding have been changed by the agreement of the parties, express or implied, the holding for each year is treated as being upon the same terms as those agreed upon for the first year's occupancy.

The tenant is substantially a tenant at will, except that, as previously stated, he cannot be turned out summarily, or without a regular notice to quit, of the duration named,³ and if such notice is not given, he may continue in possession from year to year, *for any number of years*, until his tenancy is surrendered, or extinguished

will; yet, it has been held that *if he subsequently pays rent under that agreement*, he thereby becomes tenant from year to year." See also *Cox v. Bent*, 5 Bing. 185, to the same effect. Also *Hull v. Wood*, 14 M. & W. 682; *Jones v. Willis*, 8 Jones (N. C.) 430; *Williams v. Deriar*, 31 Mo. 13, and an agreement to pay rent has the same effect as its actual payment. There are a class of cases in which it is apparently held that a general holding from year to year without reference to the circumstance of annual rent or other incident pointing to such a tenancy, constituted a tenancy from year to year, but it will be found that in all these cases there was either an express reservation of annual rent, or an actual

payment of rent with reference to a yearly holding, or an express annual demise, *Martin v. Watts*, 7 T. R. 85; *Timmins v. Rawlinson*, 3 Burr. 1609; *Den. v. McKay*, 2 N. J. L. 420; *Jackson v. Bryan*, 1 John. (N. Y.) 322; *Leavitt v. Leavitt*, ante, or the question arose in relation to, or turned upon, the right to emblements. *Ellis v. Paige*, ante. See as to necessity of six calendar months' notice to quit, *Hall v. Myers*, 43 Md.; *Hanchett v. Whitney*, 1 Vt. 315.

¹ 3 Preston's Conveyancing, 76.

² *Cattley v. Arnold*, 1 J. & H. 651; *Bartlett v. Baker*, 34 L. J. Exchq. 11.

³ *Smith's Landlord and Tenant*, 24; *Walker v. Constable*, 8 Wils.

by the Statute of Limitations, or by the cessor of the landlord's title,¹ and it is not determined by the death of either party,² except in a case where the estate of the lessor terminates at his death;³ in which case, unless the lease was made under some valid power that binds the reversioner, the tenant at once becomes a tenant at sufferance, and may be ejected by those entitled to the estate, *immediately* and without notice.⁴ Each year of the tenancy is treated as a prolongation of the original term, and is not a lease for *two* years and afterwards at will, *but is a continuance of the original lease for every particular year* during the continuance of the demise, and cannot be determined until the year is ended,⁵ and in prolonging, it has been held that it may be set up as a prolongation of the term under the original demise.⁶ Leases

¹ Smith's Landlord and Tenant, 34; Cole on Ejectment, 30, 441.

² Shore v. Porter, ante; Cole on Ejectment, 30, 441; Mackay v. Mackeith, 15 Ves. 241. In Hull v. Wood, 14 M. & W. 682, it was held that an unexpired term of a tenancy from year to year passed to the administrator, and that this estate was not defeated because the widow of the tenant remained in possession and paid rent to the landlord. "The lessor of the plaintiff," says PARKE, B., "has proved a tenancy from year to year in William Hull and letters of administration granted to himself. * * The term (for a tenancy from year to year is a term) therefore vests in him, *until there is some legal determination of it*; and thus he has made out a good *prima facie* case, because the onus of proving a legal determination of the term rests on the defendant."

³ Thomas v. Roberts, 17 M. & W. 771.

⁴ PARKE, B., in Thomas v. Roberts, 16 M. & W. 780.

⁵ Stomsil v. Hickey, 2 Salk. 413; Legg v. Strudwick, 2 Salk. 414. "Every year after is a *springing interest arising upon the first contract and parcel of it*; so that if the lessee had occupied eight, or ten years or more, these years by computation from the time past, made an entire lease for so many

years; and if rent was in arrear for one of those years, and part of another, the lessor might distrain, and need avow as far as for so much rent upon one entire lease, and need not avow as for several rents due upon several leases, accounting each year a new lease. It was also adjudged (alluding to Legge v. Strudwick, 2 Salk. 214), that after the commencement of each new year, this had become an entire lease certain for the years past, and also for the year entered upon, so that neither party could determine their wills till that year was run out, and," he adds, "this seems no way impeached by the Statute of Frauds, which enacts, &c., * * for at first, this being a lease certain only for one year, and each accruing year after *being a springing interest to that year*, it is not a lease for any three years to come, though by a computation backward when five or six or more years are past, this may be said a parol lease for so many years, but with this the statute has nothing to do but only looks forward to parol leases for above three years to come."

⁶ PARKE, B., in Oxley v. James, 13 M. & W. 212. But in Alexander v. Harris, 4 Cr. (U. S.) 299, it was held that, where a party entered under a demise for a year certain and held over by consent,

from year to year give only one time of continuance, and only one estate.¹ But, where the lease does not contemplate a holding except for one year, or any other limited term, and the lessee *by holding over and paying rent* becomes a tenant from year to year, he is treated as holding under a new demise for each year upon the terms of the original lease. That is, his tenancy commences with each year, *upon the terms of the old lease, unless the terms have been modified*, and it is held that it may be so plead.² Indeed, it must be so plead, and a plea setting it up as a *continuous* term and parcel of the original term would be bad.³ A tenant from year to year has a demisable estate

his tenure could *not* be set up in pleading as for the whole number of years, during which it had existed, except where such prolongation was contemplated by the original lease. And this would seem to be in accordance with the practice in this country.

¹ MR. PRESTON, in his works upon conveyancing (76, 77) in speaking of the qualities of this species of estate, says: "Leases from year to year appear at first view to give several distinct estates. In truth, they give only one time of continuance. That time, however, may be confined to one year, or extended to several years, according to circumstances attending the tenancy in its progress. In the first place, the lease is for one year certain, and after the commencement of every year, or perhaps after the expiration of that part of the year in which a notice determining the tenancy may be given, it is a lease for the second year; and in consequence of the the original agreement of the parties every year of the tenancy constitutes a part of the lease, and eventually becomes a parcel of the term; so that a lease, which is in the first instance but for one year certain, may, in the event of a term, be one hundred years or more. Under this species of tenancy the law considers the lease with a view to the time which has elapsed, as arising from an estate for all that time, including the current year. For, as all the time

for which the land may be held under a running lease is originally given, and in effect passes, by the same instrument or contract, the whole time is consolidated, and every year as it commences, forms part of the time." See also, Cole on Ejectment, 441-2; Bacon's Abr. Title Leases (L.) 3, p. 180.

² A person holding over, is presumed to do so upon the terms of the original holding, *Reithmun v. Brandenburg*, 7 Cal. 480; but this presumption may be overcome by proof that the tenant was notified that an increased rent would be charged, *Thompson v. Sanborn*, 52 Mich. 141. A mere verbal notice to a tenant from year to year of an increase of rent if he holds over is held not sufficient, *Witte v. Witte*, 6 Mo. App. 488; *St. Louis Q. R. Co. v. Ludwig*, 6 id. 583; *Cattley v. Arnold*, 1 J. & H. 651; *Tompkins v. Lawrence*, 8 C. & P. 729, as to implied terms of tenancy resulting from holding over under a lease for a year, &c., as stated in the text. See *Frantz v. Wood*, 2 Hill (S. C.) 867; *Quinette v. Carpenter*, 35 Mo. 502; *Ellis v. Paige*, 1 Pick. (Mass.) 43; *Laguerenne v. Dougherty*, 35 Penn. St. 45; *De Young v. Buchanan*, 10, G. & J. (Md.) 149; *Diller v. Roberts*, 17 S. & R. (Penn.) 226; *Hoff v. Ladd*, 1 Cr. (U. S. C.) 167; *Hemphill v. Flynn*, 2, Penn. St. 144; *Jackson v. Salmon*, 4 Wend. (N. Y.) 327.

³ *Tompkins v. Lawrence*, 8 C. & P. 729; *Cattley v. Arnold*, ante; *Gandy v. Jubber*, 5 B. & S. 78, 485.

in the premises, and he may mortgage¹ or assign the same,² and it may also be taken upon an execution against him.³ If the terms of the original lease have been changed in any respect, either by notice or by agreement, as, if the rent had been increased or decreased, the old lease will control except in so far as it has been so changed.⁴ If a tenant is notified *before* the expiration of his term that if he remains he will be required to pay an additional rent named and in a certain mode, by remaining, although under protest and with a notice to the landlord that he will remain only until he can secure another place, he becomes liable for the rent for the year.⁵

SEC. 22. *How created.*—A tenancy from year to year may be created by express agreement, even by parol, as, if A lets to B a tenement “from year to year” at a certain rent per year, and from a certain time, and B enters into possession, a tenancy from year to year is created, which A may determine at the end of the first year, by giving six months’ notice to quit,⁶ as from the very first,

¹ *Burrows v. Gradin*, 1 Dowl. & L. 213.

² *Austin v. Thomson*, 54 N. H. 113; *Pleasant v. Benson*, 14 East, 234; *Cady v. Quarterman*, 12 Ga. 386; *Mackay v. Mackeith*, 4 Doug. 213. CONTRA, and holding that an assignment by the landlord operates a destruction of the tenant’s right to notice, see *Hemphill v. Giles*, 66 N. C. 512.

³ *Doe v. Ridout*, 5 Taunt. 519.

⁴ *Fox v. Abbott* (N. Y.) 18 Weekly Dig. 159; see *Smith v. Ahlt*, 4 Abb. (N. Y.) N. C. 205; *Clapp v. Noble*, 84 Ill. 62.

⁵ *Brinkley v. Wolcott*, 10 Heisk (Tenn.) 22.

⁶ *Cole on Ejectment*, 442; *Clark v. Smarbridge*, 7 Q. B. 957. It was formerly held, however, that a lease from “year to year,” was at least a lease for *two* years certain. *Agand v. King*, Cro. Eliz. 775; *Potkin’s Case* cited, 6 Coke 35 b; *Crockerell v. Owerell*, Holt, 417; *Legg v. Strudwick*, 2 Salk. 414, and some of the cases held that a lease for one year, and then from year to year, was a lease for *three* years. Anonymous, Winch, 32;

Castrike v. Mason, 2 Keb. 543; *Potkin’s Case*, 6 Coke, 35 b, and some that it was a lease for *two* years certain, and after that the lessee became a tenant at will. *Stomfil v. Hickes*, 2 Salk. 413, and *Gid. 135*. *Bellasis v. Burbriche*, 1 Ld. Rayd. 170. But in 1699 a doctrine in variance with all these cases was held, and also in variance with the doctrine stated in the text. Holding that a lease for a year certain and so from year to year was not a lease for *two* years. *Lely v. Green* cited; 1 Ld. Rayd. 708, and virtually, to the same effect, anonymous 12; Mod. 10. But the doctrine seems now well established as stated in the text. In *Clark v. Smarbridge*, ante, it was held expressly, that a tenancy from year to year, so long as both parties please, is determinable at the end of the first as well as any subsequent year, unless in creating such tenancy the parties use words that indicate that they intended to create a tenancy for two years at least; and therefore, that, where a tenant at the expiration of a term of years, held over, and the land-

it being a lease from year to year, it is subject to all the incidents of that tenancy, one of the most important of which is the right to terminate it by a half year's notice to quit. But, if a tenancy is created for one year certain, and after that from year to year, as, if A lets a tenement to B "for one year and from year to year thereafter," it is at least a lease for *two* years, and so on for any number of years, unless terminated by six months' notice given *before* the first half of the second or any succeeding year has elapsed. It cannot be terminated by a notice given the first year.¹ The right to determine such a tenancy by six months' notice, or such other notice as may be provided by statute, is an inseparable incident to it,² and will control, even where there is an express provision that the lease is to continue so long as the rent is paid.³ The right is exercisable by either the lessor or the lessee, and, as previously stated,⁴ by a surety for the lessee, and until

lord received rent from him, the landlord might by a half year's notice require him to quit at the end of the first year after the time had expired. "There is no reason," said LORD DENMAN, C. J., "why it should not be determined at the end of the first year, as well as at the end of any subsequent year, *unless the parties have by express contract prevented such determination*. In the cases, *Agand v. King*, Cro. Eliz. 775; *Jacklin v. Cartwright*, 4 East, 291; *Bellasis v. Burbriche*, 1 Salk. 204; *Legg v. Strudwick*, 2 Salk. 414; *Birch & Wright*, 17 R. 378; *Chadborn v. Green*, 9 Ad. & El. A. 58; *Rex v. Chawton*, 1 Q. B. 247, such express contract appeared, either by the pleadings or the evidence. In this case, there is no such express contract, but a tenancy of two years at least is supposed to be implied of necessity by law. The case of *Bishop v. Howard*, 2 B. & C. 100, was cited for the defendant, some words which fell from LORD TENTERDEN being supposed to be applicable; but on looking at that case it will be found that the words there used do not affect the present question; *they* show only that by holding over, and payment of rent *as rent* a tenancy from year to year is created; but

they do not touch the question when that tenancy may be determined. We are of the opinion that the tenancy from year to year, so long as both parties please, is determinable at the end of any year, the first as well as any subsequent year, unless the parties use words showing that they contemplate a tenancy of two years at least."

A lease to hold from a certain date from year to year, is not necessarily a lease for more than one year, and the lease expires on the last day of the succeeding twelfthmonth, and a notice to quit given on the last day of such twelfthmonth is good. *Fox v. Nathans*, 32 Conn. 848.

¹ *Birch v. Wright*, 1 T. R. 880; *Den. v. Cartwright*, 4 East, 31-2; *Chadborn v. Green*, 9 Ad. & El. 658; *Monck v. Geekie*, 5 Q. B. 841; *Regina v. Chawton*, 1 Q. B. 247; *Hall v. Myers* 43 Md. 581; *Hanchett v. Whitney*, 1 Vt. 315.

² In *Pleasanton's Appeal*, 75 Penn. St. 344, it was held that a surety for a lessee who held over might avail himself of the right to terminate the tenancy by giving the requisite legal notice.

³ *Warner v. Brown*, 8 East, 165.

⁴ *Ante*, n. 2.

such notice is given by one of the parties, the tenancy continues from year to year, until, in contemplation of law, it is destroyed,¹ and the fact that the tenant quits the premises, or sublets them, will not defeat the landlord's remedy against him for the rent for the current year, unless he accepts the surrender, or adopts the subtenant as his own by accepting rent from him, or other unequivocal act that shows an election upon his part to treat the former tenancy as at an end.² If an *annual rent* is reserved, the holding is from year to year, although it is expressly agreed in the lease that the tenant shall quit at thirty or any other number of days' notice, the tenancy differing in no other respect from an ordinary tenancy from year to year, except in the notice required for its termination. But if it is expressly agreed that the tenant shall always be subject to leave at six months' notice, and there is only a half-yearly rent reserved, it is a half-yearly tenancy,³ and if the tenancy is at so much rent a quarter, and there is an express agreement that the tenant shall quit at a quarter's notice, it is a quarterly tenancy only.⁴ Where the letting is by the day, week,

¹ Witt v. New York, 5 Robt. (N. Y. Supr. Ct.) 248.

² Tompkins v. Lawrence, 8 C. & P. 729; Levi v. Lewis, 6 C. B. N. S. 766; Denn v. McIntosh, 4 Ired. (N. C.) 291. See as to the right of the landlord where the tenant holds over for a single day and then quits the premises, and even when he has notified the landlord that he intends to quit, Schuyler v. Smith, ante.

³ In King v. Grafton, 18 Q. B. 496, premises were let from April 19, 1841, at the yearly rent of £42, payable quarterly, the first payment of £7 13s. 6d. to be made June 24th, 1841, being the proportion of the quarter occupied by the defendant down to that date, the tenant to have and enjoy, &c., at the said rent, *until one of the said parties should give the other six calendar months' notice to quit.* The landlord gave such notice June 24th for December 25th, 1841, and it was held sufficient. "It is no doubt true," said LORD CAMP-

BELL, C. J., "that, on an *ordinary* yearly letting, the six months' notice *must expire at the end of the year.* But here, no such words appear as make such construction necessary. The word *yearly* is only a word of calculation, the payment is to be *at the rate of a yearly rent of £42.* The first payment is to be for the periods from 19th of April to 24th of June, * * then comes the regular *habendum*, "*until one of said parties shall give unto the other six calendar months' notice in writing, to quit.*" That indicates the term, "*which is not to be less than six months, and not necessarily longer.*" * * The tenancy is not shown to have been yearly, and if it was not, there was no need that the notice should expire at the periods when the tenancy commenced."

⁴ In Kemp v. Derrett, 8 Camp. 510, the defendant became a tenant of the premises, to the plaintiff on the 29th Oct., 1810. The agreement between them was, "that

month, or quarter, at a specific rent for the specific term, the letting is a daily, weekly, monthly or quarterly tenancy, according to the circumstances. Thus, where a wharf, warehouse and buildings were let at a certain rent per quarter upon the terms that the rent should be paid down on the day of the commencement of the tenancy, and so on so long as the hiring continued, it was held a quarterly and not a yearly hiring, and the term expires at the end of each quarter.¹ In one case where a stable was let "for a week for 8s., and so from week to week, so long

the defendant was always to be subject to quit at three months' notice." The defendant had three months' notice to quit at Christmas or pay double rent, but he did not quit. In action to recover double rent, LORD ELLENBOROUGH said, "This appears to me to be a holding from three months to three months. Thereupon a notice to quit expiring at the end of any quarter from the time of entry would have been sufficient to determine the tenancy. I am quite clear, however," he added, "that the notice should have expired on the 29th of January, 29th April, 29th July, or the 29th of October. The defendant might have been made to hold from the preceding or succeeding general quarter day; but in the absence of all evidence to the contrary, I must presume that he held from the time he entered as tenant." See *King v. Grafton*, 18 Q. B. 276, where it was held that a lease determinable by either party at six months' notice to quit, need not be a notice expiring at the end of the year, but that the tenancy was ended by the giving of six months' notice, expiring at any time. See also *Carter v. Roe*, 10 M. & W. 670. In Rhode Island the statute requires "notice in writing" to terminate a lease and it is held that this requires an *original* and that a *copy* will not suffice, *Matthewson v. Thompson*, 12 R. I. 228. In Massachusetts it is held that if any notice to a tenant at will is necessary, two days' notice is reasonable, *Arnold v. Nash*, 126 Mass. 396. In New Jersey it is held—in accordance with the well settled rule—that a tenant for a

month, who holds over, is not entitled to notice to quit, *State v. Moore*, 41 N. Y. L. 515. See also *Dale v. Doddridge*, 9 Neb. 138; *Kunzie v. Wixon*, 39 Mich. 384.

¹ *Wilkinson v. Hall*, 4 Scott, 301; *Towne v. Campbell* 8 C. B. 921. In *People v. Shacko*, 48 Barb. (N. Y.) 551, a parol agreement for a lease, providing for the renting of the premises for one month and for each successive month thereafter until the owner should want the premises for his own use, was held to create a tenancy at will, which might be terminated without thirty days' notice to quit. *Witt v. Mayor, &c.*, 6 Robt. (N. Y. Supr. Ct.) 441. In *Towne v. Campbell*, 16 L. J. C. P. 104, the only evidence on which apartments were hired was a receipt as follows: "Received C. £126, for rent of furnished house from the 8th of May to the 1st of August, 1846," and the court held that from these facts the jury might properly find a weekly tenancy. In *Coffin v. Lunt*, 2 Pick. (Mass.) 70, it was held that, in case of a tenancy from month to month, sixty days' notice was sufficient. In Missouri it has been held that a *general* hiring without limitation as to time, though at a monthly rent, is a tenancy from year to year. *Ridgely v. Stilwell*, 25 Mo. 570. A demise from year to year is not established by proof that the tenant held by the quarter. *Wilkinson v. Hall*, 3 Bing. N. C. 508. In *Shorey v. Farrell*, 114 Mass. 441, where a tenant hired a room with steam power, at a monthly rent, it was held that he was not entitled to a month's notice to quit.

as both parties should please," it was held that this at most was but a lease for three weeks certain,¹ but under the decisions previously referred to,² it would be a lease only for a week certain. In the case of farms and lands generally, if no term is specifically agreed upon, by custom, the presumption is that it is a yearly hiring,³ and in the absence of any stipulation to the contrary, this is the rule as to all general hiring. "So long ago as the time of the year books," says LORD KENYON, C. J., "it was held that a general occupation was an occupation from year to year,"⁴ and this rule was, as previously stated,

¹ *Panton v. Isham*, 3 Lev. 859. In *Western Union Tel. Co. v. Fain*, 52 Ga. 18, a tenancy under a parol lease for three years at a monthly rent, was held not to be a tenancy from year to year, but terminable as a tenancy at will by two months' notice.

² See ante, p. 00, note.

³ *Martin v. Watts*, 7 T. R. 85.

⁴ *Martin v. Watts*, ante. Until the time of Henry the Eighth, a general letting of land created merely a tenancy at will, but the injustice of this doctrine and its serious injury to agricultural interests, led to a change in the doctrine, and it was then decided that a general letting or occupation, should be considered as *prima facie* a letting from year to year. Chitty on Contracts, 320, but it is now competent for parties by express agreement to create a tenancy at will. *Parker v. Constable*, 8 Wils. 25; *Cudlip v. Rundle*, 4 Mod. 9; *Timmins v. Rawlinson*, 8 Burr, 1608; *Warner v. Brown*, 8 East. 165; *Rex v. Fillongley*, Cald. 569. This has led several authors, among them MR. CHITTY, MR. PLATT and others (*Chitty on Contracts*, 320; 1 Platt on leases, 652), to intimate that tenancies at will are comparatively unknown in modern practice, but such is not the case, and such tenancies are now quite common and are well known to and recognized by the courts. MR. SMITH, in a note to *Clayton v. Blakely*, 8 T. R. 8; 2 Smith's L. C. 76 a, says: "There is no doubt that a tenancy at will, strictly speaking, may still be created. *Ball v. Cullimore*, 5

Tyrwh. 758. It may be so by express words. *Richardson v. Langridge*, 4 Taunt. 128; *Cudlip v. Rundle*, 8 Mod. 9; *R. v. Fillongley*, Cald. 569; *Bastow v. Cox*, 12 Q. B. 122. A person who holds, rent free, by the permission of the owner is a tenant at will. *R. v. Collett*, Russ. & Ry. 498; *ex. gr.* a minister placed in possession by trustees for the congregation. *Doe v. Jones*, 10 B. & C. 718; *vide tamen* *Wilkinson v. Malin*, 2 Tyrwh. 544. So a person entering under an agreement to purchase, or for a lease, and who has not paid rent, see *Regnart v. Porter*, 8 Bingh. 451; *Doe v. Miller*, 5 C. & P. 595; *Riseley v. Ryle*, 11 M. & W. 16; although he has paid interest, *Tomes v. Chamberlain*, 5 M. & W. 14; see *Howard v. Shaw*, 8 Ibid. 119; *on payment of rent, however, he becomes tenant from year to year*; *Mann v. Lovejoy*, R & M. 355; see *Saunders v. Musgrove*, 6 B. & C. 524; *Chapman v. Towner*, 6 M. & W. 100; *provided that he pays it with reference to a yearly tenancy*; for, as BARON PARKE observes, in *Braithwaite v. Hitchcock*, 10 M. & W. 497, "although the law is clearly settled that where there has been an agreement for a lease, and an occupation without payment of rent, the occupier is a mere tenant at will, yet it has been held, that if he subsequently pays rent under that agreement he thereby becomes tenant from year to year. Payment of rent, indeed, must be understood to mean *payment with reference to a yearly holding*; for in *Richardson v. Langridge*, a

predicated upon the principle, "that he who sows shall reap," and in the case of farms and lands used for agri-

party who had paid rent under an agreement of this description, but had not paid it with reference to a year, or any aliquot part of a year was held, nevertheless, to be a tenant at will only. See also the judgment of the same learned judge in *Doe d. Hull v. Wood*, 14 M. & W. 687; and the reason is, because the payment of rent by the occupier, with reference to a yearly holding, and the receipt of it by the landlord, is evidence of the intention of the parties that a yearly tenancy should be created. It is, however, only evidence; and although in the absence of other circumstances, showing a contrary intention, it would be deemed conclusive, yet where it appears the parties do not intend it to have that effect, the tenancy at will remains unaffected by it; thus in the case of *Bastow v. Cox*, 11 Q. B. 112, where ejectment was brought by B. E. & M., mortgagees, against the defendant, mortgagor, the mortgage deed contained the following clause, "And the said W. Cox hereby agrees to become tenant to the said B. E. & M. henceforth during their will and pleasure, at and after the rate of £25 6s. per year, payable quarterly on the 18th of September, 18th of December, 18th of March, and 18th of June;" the defendant having made default in payment of the installments of the mortgage money and rent, the lessors distrained for four quarters' rent; afterwards, they gave a week's notice to quit and brought ejectment. It was contended on behalf of the defendant that he was, under the circumstances, tenant from year to year, and that a six months' notice was requisite; the learned judge (Mr. Justice Coltman) however, decided, that the defendant continued tenant at will, and that the notice was sufficient. The Court of Queen's Bench was clearly of opinion that he was right, and refused a rule for a new trial. It has already been shown in the notes to *Keech v. Hall*, that there are certain cases in which a mortgagor in possession becomes tenant

at will to the mortgagee. [A vendor who remains in possession after having conveyed, is not tenant at will to the vendee (*Tew v. Jones*, 13 M. & W. 18), because he is not in possession necessarily by the consent of the vendee; but it may perhaps be laid down, that wherever a person is in possession of land in which he has no freehold estate, nor tenancy for any certain term, and which he nevertheless holds by the consent of the true owner, that person is tenant at will, and as such is liable to pay for his occupation, if beneficial (*Ibbs v. Richardson*, 9 Ad. & El. 849; *Howard v. Shaw*, 8 M. & W. 119), unless there be a stipulation that he shall occupy rent free. See per *ALDERSON, B.*, in *Howard v. Shaw*, and *Winterbottom v. Ingham*, 7 Q. B. 611, in which case it was held that a party remaining in possession under a contract for purchase which ultimately fails for want of title, is not liable to pay for such occupation, though it be found to be beneficial up to the time of the determination of the contract;—*secus* if he remain after such determination, *Howard v. Shaw*.]

On account of the peculiar origin of a tenancy from year to year, and its being still in contemplation of law a tenancy *at will*, it seems to have been thought by three judges, in *Doe v. Wells*, 10 Ad. & El. 427, that it would be possible to put an end to it by the parol consent of both parties, such parol consent not operating as a *disclaimer*, which cannot be by mere words, nor as a *surrender*, which would be opposed to the Statute of Frauds, but as a *determination of the will* of both parties. But until determined, the tenancy from year to year is a term which will pass to the personal representative. *Doe d. Hull v. Wood*, 14 M. & W. 682. So tenant from year to year, demising from year to year, or for a term of years, has a reversion which enables him to distrain. *Curtis v. Wheeler*, Moo. & M. 493, and see *Oxley v. James*, 13 M. & W. 209, where tenant from year to

cultural purposes, it applies with additional force, as the harvest is gathered but once a year, and the enjoyment of the produce is presumed to have been the consideration for which rent was agreed to be paid.¹ If a lease is made of land to be used as a nursery for raising fruit-trees at a yearly rent, it will be treated as a lease from year to year so long as is necessary to accomplish the purpose.² So, if a wheat field, a vineyard, an orchard, an orange grove, &c., be leased at a usual and ordinary rent, and no limitations are imposed as to time, it will be deemed a tenancy for a year, and so on from year to year, in order that the tenant may reap the harvest and gather the fruits and products of the soil when they mature, upon the principle that the rent is presumed to be paid for those products, and not for the barren occupation of the land itself. "If," says MR. ADAMS in his excellent work upon Ejectment,³ "the produce of the land requires two years to come to perfection, as, if it be licorice, madder, &c., a general holding will, it seems, ensure as a tenancy from two years to two years, and cannot be determined by a notice at the end of the second or third year." According to POTHIER, the same rule prevails in the French law. He says,⁴ "if the parties have omitted to express the duration of the term, the lease will nevertheless be valid. If it is a demise of an inheritance of which the fruits are gathered every year, such as a meadow, vineyard, &c., the lease is deemed to have been made for a year. When it is a lease of an inheritance, the fruits of which are gathered at intervals of several years, the lease is deemed to continue for all

year having demised for thirty-four years to the plaintiff, who sub-let for eighteen years and a quarter to the defendant, against whom he declared in covenant for non-repair, pursuant to the terms of the sub-lease. It was held that the plaintiff, if he could not in pleading describe his interest as an absolute term for thirty-four years (which however semble he could after its expiration), might clearly allege it to be a tenancy for thirty-four years "provided the tenancy

from year to year should so long continue."

¹ *Ellis v. Paige*, 1 Pick. (Mass.) 48; *Hanchett v. Whitney*, 2 Aik. (Vt.) 240; *Fawke v. Beck*, 1 Speers. (S. C.) 291; *Hall v. Hall*, 8 G. & J. (Md.) 386; *Frantz v. Wood*, 2 Hill (S. C.) 367.

² *King v. Wilcomb*, 7 Barb. (N. Y.) 263; *Miller v. Baker*, 1 Met. (Mass.) 27.

³ *Adams on Ejectment*, 188.

⁴ *Pothier's Louage*, 28.

the time that is requisite to enable the tenant to gather in the fruits. For instance, if, after having fished my fish-pond, which has been accustomed to be fished every three years, I grant it to farm to another at a certain price, without expressing the term of hiring, I am deemed to have demised it for the term of three years."¹ When lands are leased *at an annual rent* "forever," so long as the rent is regularly paid, the tenancy is merely from year to year,² and this is also the rule when an agreement under which the tenant enters provides that the lessor is not to determine the lease so long as the tenant pays the rent and performs the conditions of the agreement. It is merely a lease from year to year, and may be determined by the lessor by six months' notice to quit, given during the first half of any year; otherwise it would be a lease for life, which can only be by deed, or a lease from year to year, determinable only at the election of the lessee, which, in the language of LORD ELLENBOROUGH, "is entirely repugnant to the nature of a tenancy from year to year,"³ and the rule is the same, whether the lease is made by or to a corporation, or by or to an individual.⁴

A lease granted for seven, fourteen, or twenty-one years, as the lessee shall think proper, is a lease for sev-

¹ See also to same effect, *King v. Wilcomb*, ante.

² *Doe v. Gardiner*, 12 C. B. 319; *Sealey v. Randolph*, 4 Rawle (Penn.) 123; *People v. Rickert*, 8 Cow. (N. Y.) 226; *Danforth v. Sargent*, 14 Mass. 491; *Vrooman v. McKaig*, 4 Md. 456; *Brewer v. Knapp*, 1 Pick. (Mass.) 332; *Thomas v. Ringle*, 9 S. & R. (Penn.) 87.

³ *Warner v. Brown*, 8 East, 166. See also to same effect, *Doe v. Crago*, 6 C. B. 90; *Pennington v. Taniere*, 12 Q. B. 998.

⁴ *Pennington v. Taniere*, ante; *Wood v. Tate*, 2 N. R. 247. A corporation stands in the same relation to tenants that an individual does. If it makes a void or voidable lease for a term of years, and the tenant enters under it and pays yearly rent or rent with reference to a yearly holding, a tenancy from year to year, subject to the

conditions of the lease so far as applicable, is created. Rent implies a demise; and from its payment an inference arises, that everything essential to the demise has been done, and whether the lease may be said to operate as a demise or as a bare permission, it binds the lessor whether he be an individual or corporation; the party occupying and paying rent under it acquires rights from the corporation, becomes their tenant from year to year, and can be ejected only by the same means as would be available to an individual landlord. *Beverley v. Gas Light Co.*, 6 Ad. & El. 329. And a corporation may become a tenant from year to year, and liable for rent or use and occupation the same as an individual. *Lowe v. L. & N. W. R. R. Co.*, 18 Q. B. 636.

en years certain; then if the lessee commences another term of seven years, it is a lease for fourteen years, and if at the end of that time he commences another term it is a lease for twenty-one years,¹ and is determinable at the option of the lessee only.² So it has been held that a lease for ten years with a provision that upon the performance of certain conditions it shall be renewed for ten years more, is, upon the performance of such conditions, a lease for twenty years.³ In the absence of words limiting or defining the nature of a tenancy, the principal test of a tenancy from year to year is whether there is a reservation of *annual rent*, or payment of, or an agreement to pay rent for such an aliquot part of a year, as monthly, quarterly, or half-yearly, so that a presumption can be raised that the parties intended to create such a tenancy.⁴ A mere permission to occupy for an indefinite period, no rent being reserved, does not create this species of tenancy;⁵ but if weekly or monthly rent even is reserved, it is a tenancy from year to year,⁶ it being presumed that it is a monthly rent with reference to a yearly holding.⁷ But even though an an-

¹ *Ferguson v. Cornish*, 3 T. R. 463. To same effect see *Goodright v. Richardson*, 3 id. 462.

² *Dunn v. Spurrier*, 7 Ves. Jr. 231; *Doe v. Dixon*, 9 East, 15.

³ *Ranlett v. Cook*, 44 N. H. 512.

⁴ *Hull v. Wood*, 14 M. & W. 682; *Richardson v. Langridge*, 4 Taunt. 128. A general letting, without limitation as to the time, though for a monthly rent, creates an estate from year to year, *Redgley v. Stetwell*, 25 Mo. 570; *Braithwaite v. Hitchcock*, 10 M. & W. 494; *Rich v. Bolton*, Vt.

⁵ It simply creates a tenancy at will. *Hull v. Wood*, ante; *Williams v. Deriar*, 31 Mo. 13. In New Hampshire, under the statute, it is held that a verbal agreement that a person might live on a farm and carry it on, and that he and the plaintiff should constitute only one family during their lives, and that they should pay the debts due from the estate, and an entry and possession under the agreement constitutes a *tenancy at will from year to year*, and a

notice to quit of less than three months as provided by statute, reducing the notice required by the common law, is insufficient. *Leavitt v. Leavitt*, 47 N. H. 329. But if rent is reserved in any form, that is referable to annual rent, it is sufficient. *Hanchett v. Whitney*, 2 Aik. (Vt.) 249. In Maine and Massachusetts tenancies from year to year do not exist, as, in all cases of indefinite hiring, notice to quit is necessary, *Withers v. Larabee*, 48 Me. 470; *Ellis v. Paige*, ante.

⁶ *Ridgeley v. Stilwell*, 25 Mo. 570. In a Pennsylvania case.

⁷ In *Lloyd v. Cozens, Ashm.* (Penn.) 131, a lease was made on June 1st, 1827, reserving rent payable quarterly, to hold the same from year to year upon condition that, if the rent was not paid in ten days after quarter-day, the lease should be null and void. It was held that the lease was from year to year notwithstanding the condition.

nual rent is reserved, and the term is indefinite, yet, *if the term is determinable at the election of the lessee at any time*, or if it is determinable at his election *before a certain time*, it is not a tenancy from year to year.¹

It is not essential that there should be an agreement to pay in money, but, if the rent is fixed at a certain sum for the year, although the lease is upon condition that the tenant may occupy at such yearly rent until he has re-imbursed himself for repairs made upon the premises, yet, it has been held that a tenancy from year to year is thereby created, because the *two* elements, annual rent and indefiniteness of term, concur.² Even though there has been no lease or agreement at all, if an annual rent

¹ *Stedman v. McIntosh*, 4 Ired. (N. C.) L. 292, "It is," said LORD ELLENBOROUGH in *Warnerv. Brown* 8 East, 167, "entirely repugnant to a tenancy from year to year, that the option of determining it should rest solely with the tenant."

² *Thomas v. Wright*, 9 S. & R. (Penn.) 87. In a Vermont case, *Hanchett v. Whitney*, 2 Aik. (Vt.) 240, the defendant went into possession of his father's farm, upon condition that he should support his father. The father became dissatisfied and moved away and sold the farm to the plaintiff, who brought ejectment to recover possession without giving six months' previous notice to quit. The court held that the son was a tenant from year to year, and could not be ejected except at the end of a current year, and then only by six months' previous notice to quit. In a Maryland case, A conveyed to B certain tracts of land and personal property, to be held by B "in trust for the use of A during his life; and after his death, in trust for his daughter C and her four children, share and share alike, as tenants in common." Upon the death of A, the trustee went into full possession of the whole property, and soon after requested C to take possession of the farm, agreeing with her, at the time, that she and her children should eat and wear, each, her and his fifth part of the proceeds of the property under the deed of

trust; reserving to himself, B, the right at all times to manage and control all the trust property by himself and agents. Under these circumstances, C, with her children, went upon a farm, part of the trust property. It was held that the right of management reserved to B was to be exercised during C's possession; that it did not authorize him to dispossess her at pleasure, nor depute others to do it; but was a mere right of supervision and general direction, as to the course of cultivation and general conduct of the property; that the legal effect of the agreement was not to create a tenancy at will, but a tenancy from year to year, on that part of the premises only which was secured to the children by the deed, leaving C to the full enjoyment of her absolute right of property in her fifth part of the estate. *Hall v. Hall*, 6 G. & J. (Md.) 386. A lease for no definite time, with an annual rent, payable quarterly, is a lease from year to year, and cannot be terminated except at the close of the year, by previous notice to quit of the duration required by statute, or in the absence of any statutory regulation upon that subject, by the common law, and, if the tenant commences a new year without having had notice to quit from the landlord, he cannot be turned out until the next year; but he must pay his rent quarterly as provided in the lease, and perform all

has been paid for several years, a tenancy from year to year is thereby raised ;¹ but there must be a payment of rent *as rent* ; if the party enters under an agreement to purchase, and pays down a certain sum, which it is agreed shall be considered as a year's rent, in case he fails to perform, and failing to perform, he holds over into another year, he is not a tenant from year to year, because there can be no presumption raised from these facts that the amount of the advance sum paid by him was paid *as rent*, or that it was fixed with any reference to the actual rental value of the premises, and consequently that the person holding over, held over at that rental,² and, even though such a presumption could be raised from the circumstances, yet in this, as all other cases of a tenant holding over by the permission of the landlord, it may be rebutted by showing that the holding was not in the character of tenant, or that it was for some other purpose.³ If a lease contains a provision that, unless the tenant gives notice of a certain duration, of his intention not to continue in possession beyond the expiration of the term, he shall be regarded as electing to stay for another year, unless the tenant complies with the notice, he will be bound as tenant for another year.⁴

the other conditions contained therein. *Lesley v. Randolph*, 4 Rawle (Penn.) 128; *Rich v. Bolton*, ante.

¹ *Hall v. Wadsworth*, 28 Vt. 410; *Hunt v. Morton*, 18 Ill. 75.

² *Williamson v. Paxton*, 18 Gratt. (Va.) 475. That the payment or receipt of rent *as rent* is *prima facie* evidence a contract of renting. See *Wood v. Tate*, 2 N. R. 247; *Johnson v. Jones*, 9 Ad. & El. 809; *Pritchard v. Dodd*, 5 B. & Ad. 689; *Jackson v. Ramsbotham*, 3 M. & S. 516; *Rex v. St. Martin*, 2 Ad. & El. 210; *Simpkin v. Ashurst*, 1 C. M. & R. 365; *Clun v. Clarke*, Peake's Addl. Cas. 239; *Jackson v. Williamson*, 3 B. & C. 413; but it is not evidence of any particular tenancy, but the presumption arising from it is of a tenancy from year to year. *Pritchard v. Dodd*, ante; *Williamson*

v. Paxton, 18 Gratt. (Va.) 175, but this presumption may be repelled by proof of a holding in a different character or for a different purpose. *Williamson v. Paxton*, ante; *Harvey v. Francis*, 2 M. & Rob. 57; *Phillips v. Mosely*, 1 C. & P. 262; even when paid *qua* rent, *Strahan v. Smith*, 4 Bing. 91. But from payment of rent under a lease for an indefinite period, a tenancy from year to year is *implied*, as if the reversioner receives a certain sum as rent under a lease granted by one having no power to bind him, a tenancy from year to year springs therefrom. *Tucker v. Morse*, 1 B. & Ad. 365; *Jordan v. Wood*, 1 H. Bl. 97; *Martin v. Watts*, 1 T. R. 83.

³ *Williamson v. Paxton*, ante; *Lord v. Crago*, 12 Jur. 705; *Clemmett v. Bradbee*, 1 B. C. Rep. 65.

⁴ *Dix v. Atkins*, 130 Mass. 141.

SEC. 23. Entry under agreement for a lease ; effect of.—Where a person is let into possession under an agreement for a lease, or under a lease void under the Statute of Frauds, he is a mere tenant at will ; *but upon payment of rent by him, he at once becomes a tenant from year to year, upon the terms of the intended lease*, so far as they are applicable to and not inconsistent with a yearly tenancy.¹

¹ *Westmorland v. Smith*, 1 M. & K. 187. The rule as established by numerous authorities is, that if a party enters into possession under an agreement for a future lease, and in expectation of it, and pays rent, he becomes a tenant from year to year. *Aldershaw v. Breach*, 6 Esp. 106 ; *Sullivan v. Jones*, 3 C. & P. 579 ; *Hamerton v. Stead*, 3 B. & C. 478 ; *Broomfield v. Smith*, 6 East 530 ; *Knight v. Bennett*, 3 Bing. 361 ; *Cox v. Bent*, 5 Bing. 185 ; *Chapman v. Towner*, 6 M. & W. 100 ; *Doe v. Smith*, 1 Myl. & K. 137 ; *Bolton v. Tomlin*, 5 Ad. & El. 856 ; *Doe v. Foster*, 3 C. B. 215 ; *Bannister v. Osborne*, Peake's Addl. Cas. 76, and according to the latter case, a constructive possession by the tenant is sufficient, as, if he puts up a *to let* upon the premises. Upon the point that entry and payment of the rent as previously stated constitute a tenancy from year to year, see, in addition to the cases already cited, *Thompson v. Amey*, 12 Ad. & El. 476 ; *Berry v. Lindley*, 3 M. & G. 498 ; *Riggs v. Bell*, 5 T. R. 471 ; *Bennett v. Ireland*, E. B. & E. 826 ; *Richardson v. Gifford*, 1 Ad. & El. 52 ; *Braithwaite v. Hitchcock*, 10 M. & W. 494 ; *Manning v. Lovejoy*, Ry. & M. 355. Thus, in *Thompson v. Amey*, ante, A agreed to lease a certain farm to B, at a certain yearly rental, and also upon condition that B would cultivate, pay rent, &c., and B entered into possession and paid rent under the agreement, but no lease was ever made. The tenant having violated the conditions of the *intended* lease, as expressed in the agreement as to the cultivation of the land, the landlord brought ejectment, and the court held that the defendant having entered un-

der the agreement for a lease which was to contain a covenant against taking successive crops of corn, and a condition for re-entry in case of breach was subject to such condition, and that ejectment lay for its breach *because the agreement was such that either party might have procured a specific performance thereof in equity*.—*PATTERSON, J.*, said, "It is said that a covenant respecting a rotation of crops cannot be engrafted on a yearly tenancy; but I see no reason why it should not. The tenant in possession under such circumstances is bound to cultivate the land, as if he were going to continue in possession as long as the lease itself would have lasted. It is argued that the tenancy arises by operation of law upon the payment of rent, and that the law implies no particular mode of cropping, nor any conditions of re-entry. *But the terms upon which the tenant holds are in truth a conclusion of law from the facts of the case, and the terms of the articles of agreement*," and a similar doctrine has been held in this country in numerous cases, where a tenant entered under a void lease, *Taggard v. Roosevelt*, 2 E. D. S. (N. Y. C. P.) 100 ; *People v. Rickert*, 8 Cow. (N. Y.) 226 ; *Strong v. Crosby*, 21 Conn. 398 ; *Schuyler v. Leggett*, 2 Cow. (N. Y.) 660. A tenancy from year to year is implied where a tenant enters into possession under parol or other lease void by the Statute of Frauds, and the rights of the parties may be ascertained by a reference to the lease. *Martin v. Smith*, 48 L. J. Exchq. 42 ; *Porter v. Blielery*, 17 Barb. (N. Y.) 149 ; *Barlow v. Wainwright*, 22 Vt. 88 ; *Thurber v. Dwyer*, 10 R. I. 355 ; *Riggs v. Bell*, 5 T. R. 472

A stipulation for two years' notice to quit is held to be inapplicable to such a tenancy;¹ consequently, if an agreement for a lease under which a tenant enters and

Collins v. Weller, 7 id. 478; *Gaston v. Smith*, 33 N. Y. 245; *Shepherd v. Cummings*, 1 Caldw. (Tenn.) 354; *Lounsbury v. Snyder*, 31 N. Y. 514; *Thomas v. Nelson*, 5 id. 118; *Berry v. Lindley*, 3 M. & G. 498; *Clayton v. Blakely*, 8 T. R. 8. But, in order to raise such an inference, the agreement of *all* the parties must be shown, and if there are three or more parties, and the agreement of two only is shown, such a tenancy cannot be implied as against the other party. *Goodtitle v. Herbert*, 4 T. R. 680. In *Dodge v. Bowers*, 2 M. & W. 365, A, B and C, C being an unmarried woman, entered into an agreement, dated 25th December, 1834, to take a house of the plaintiff for seven years, at a certain annual rent, payable quarterly; under which they entered. In September, 1835, C married; in December A became bankrupt. In an action of debt by the plaintiff against A, B, C and C's husband, for two years' rent, claimed to be due under the demise contained in the above agreement, the defendants by their plea denied the demise. There was also a count for use and occupation, to which they pleaded payment of all the rent due before C's marriage. The defendants proved payment by A's assignees of the quarter's rent at Michaelmas, 1835, and an admission by the plaintiff of the receipt of the two previous quarters' rent; but it is not shown when or by whom these latter payments were made.—*Held, that this was not evidence* from which a new yearly tenancy, on the terms of the agreement, could be inferred, so as to charge all the defendants, inasmuch as it was not shown that the payments were made before C's marriage, or with her assent after her marriage. An entry under such a lease creates a tenancy from year to year regulated by the parol demise in all respects except as to the duration of the term. 2d. In *Braithwaite v. Hitchcock*, ante, in an action of debt for rent, stating a

demise of premises by the plaintiff to W. H., for one year, and so on, from year to year, if they should respectively please, at a yearly rent of £140, payable quarterly, and an assignment by W. H. to the defendant, the plaintiff proved an agreement (signed by himself only) for a lease of the premises by him to W. H., for seven years, at £140 a year; that no lease had been actually executed, but that W. H. had entered into possession shortly after the date of the agreement, and had paid two quarters rent, at the rate of £140 a year.—It was held that this was sufficient evidence of a tenancy from year to year, as stated in the declaration, and in which W. H. had an assignable interest. *Braithwaite v. Hitchcock*, 10 M. & W. 494. Where a person held premises under an agreement in writing, from quarter to quarter, and that the agreement provided that the tenant should quit possession upon receiving six months' notice in writing, and, in the event of his losing his license to sell ale, &c., through misconduct at any time during the term, should then forthwith quit possession, on being requested to do so by his landlord.—It was held that he had neither a tenancy from year to year nor a term certain in the premises, so as to entitle the landlord in ejectment to compel him to give security for costs under the statute. *Carter v. Roe*, 10 M. & W. 670. Where there has been an agreement for a lease and an occupation without payment of rent, the occupier is a mere tenant at will. If he subsequently pays rent under that agreement, he thereby becomes tenant from year to year. But in order to establish a tenancy from year to year in such case, the payment of rent means a payment of rent with reference to a yearly holding. *Braithwaite v. Hitchcock*, 10 M. & W. 494. See *Risely v. Ryle*, 11 M. & W. 16.

¹ *Tooker v. Smith*, 1 H. & N. 732.

occupies for several years, paying rent, contains a stipulation that the tenancy shall continue until after two years' notice, it will not be implied that such stipulation was one of the terms under which the tenant held, and all stipulations, incompatible with a tenancy from year to year, are always rejected, and those only applied that are consistent therewith.¹ It is held that an agreement as to the duration of the term is not binding, as, if the agreement is for a lease for three years, it may be put an end to at any time prior thereto by giving six months' notice to quit at the end of either year, but, if the tenant continues to occupy for the whole time, *his tenancy expires by its own limitation with the expiration of the term agreed upon*, and ejectment may be maintained at the expiration of such term without notice to quit, unless a new term has been commenced *and rent paid in pursuance of it*, so as to destroy the effect of the expiration of the term by limitation.² The principle upon which this rule is predicated is, that the tenant's legal interest ceases, when his right in equity, if assigned, would have ceased.³ Thus in a case⁴ where the defendant entered into an agreement for a lease with the plaintiff by letter of Sept. 5th, 1823, by which he was to have it for five years and a half from Michaelmas, 1823, and he entered and paid rent, it was held that a tenancy from year to year was thereby created, which could be determined only by a half year's notice during any one of the years, but that the defendant was bound to go out at the end of the term stated in the letter, *without* notice. MAULE, J., very forcibly laid down the rule and explained it, as follows: "It is admitted," said he, "on all hands, that the defendant, upon his entry, became tenant from year to year. Parties may stipulate that there shall be a tenancy from year to year determinable at a particular time. If a party enters under an invalid agreement, or under

¹ Tress v. Savage, 4 E. & B. 36; Stratton v. Pettitt, 16 C. B. 420; Arden v. Sullivan, 14 Q. B. 832.

² Davenish v. Moffatt, 15 Q. B. 257; Tress v. Savage, 4 E. & B. 36; Doe v. Stratton, 4 Bing. 446.

³ Bromfield v. Smith, 6 East, 530.

⁴ Berry v. Lindley, 3 M. & G. 498.

an agreement not amounting to a demise, he may still hold subject to the terms of that agreement so far as they are not at variance with the species of tenancy which the law, under the circumstances, creates. The effect of what passed between the parties, appears to me to be this: the defendant became tenant to the plaintiff from year to year, from Michaelmas, 1823, for so long a time as they should respectively please, *determinable at the end of any year, at a half-year's notice*, the defendant to go out at the end of five years and a half *without notice*.”¹

SEC. 24. What covenants will or will not be implied .A covenant to build, or to do such substantial repairs as are not usually done by a tenant from year to year, will not be implied or held as applicable to the relation, even though the agreement stipulates for such covenants in the lease,² but the rule is otherwise as to a stipulation to keep the premises in good and tenantable repair. Thus, in an English case, the defendant³ went into possession of premises under an agreement, by the terms of which he was to have possession for the term of three years and a quarter, he to keep the premises in tenantable repair during the tenancy. The agreement was neither stamped as a lease, nor signed by both parties, but the court held that the defendant was bound to repair during his occupancy, though the agreement was void as to the duration of the term under the Statute of Frauds. “He did not,” said PARKE, J., “legally agree for a term of three years, but, in point of law, he was tenant at will for the first year, subject to the terms of the agreement on his own part, and afterwards tenant from year to year subject still to that agreement, which bound him to keep the premises in good repair so long as he

¹ In *Davenish v. Moffatt*, ante, LORD CAMPBELL, C. J., said, “We think the tenancy created from year to year must be understood to continue only during the three years (which in this case was the time named in the lease which was void because not under seal), liable

to be determined during the three years by a notice to quit, and *expiring at the end of three years, by efflux of time*.”

² *Bowes v. Croll*, 6 E. & B. 264.

³ *Richardson v. Gifford*, 1 Ad. & El. 52.

should occupy." And so, generally, when a tenant goes into possession under an agreement for a lease, or under a *void* lease, he will be, after payment of rent under it, treated as subject to the terms and conditions of the agreement or lease so far as they are applicable to a tenancy from year to year, but no farther. If any of the conditions are inconsistent with such a tenancy, they will be rejected. Thus, where a shop was taken under an agreement for a lease that contained a stipulation that the tenant should "keep open the shop and use his best endeavors to promote the trade of it during the tenancy;"¹ a condition that he shall be paid for improvements,² or that the landlord may re-enter for non-payment of rent, or breach of any covenants, are all applicable to the *tenancy*.³ So that the tenant may retain and sow certain land demised at the seed time next after the end of the term, and have the privilege of gathering and threshing it on the premises,⁴ that the tenant shall leave all the manure at the end of his term 'against successive crops' for the payment of rent in advance,⁵ and,

¹ Sanders v. Karnell, 1 F. & F. 856.

² Bracklington v. Saunders, 13 W. R. 46.

³ Thomas v. Parker, 1 H. & N. 669.

⁴ Hyatt v. Griffith, 7 Q. B. 505.

⁵ Roberts v. Barker, 1 Cr. & M. 808.

⁶ Thomas v. Amey, 12 Ad. & El. 476.

⁷ Lee v. Smith, 9 Exchq. 662. In Steffens v. Earl, 40 N. J. L. 128, it is held that in tenancies where no time is mentioned, and no annual rent is reserved, the character of the tenure as to time will be controlled by the intervals between the payments, monthly or weekly payments implying monthly or weekly tenancies; and that in cases of a monthly tenancy, a month's notice to quit, expiring at the end of one of the periods of holding, is sufficient. The rule relative to notices seems to be as follows: *Where there is a lease for a certain period, the term determines without notice.* Cobb v. Stokes, 8 East, 358; Right v. Darby,

1 T. R. 159. In uncertain tenancies reasonable notice was necessary, which reasonable notice had from the time of Henry VIII., according to LORD ELLENBOROUGH, been six months. Doe v. Spence, 6 East, 120. In cases of tenancies for periods running less than a year, the rule enunciated by the text writers is that the notice must be regulated by the letting and must be equivalent to the period. Archb. Land. & Ten., § 87. This rule must have originated in custom and not in any decision of the courts. See Huffell v. Armistead, 7 C. & P. 56; Towne v. Campbell, 3 C. B. 921. In Doe v. Hazell, 1 Esp. 94, which was a case of ejectment, the defendant had taken the house by the month and a month's notice to quit had been given. It was agreed that the notice had reference in all cases to the letting, and that a month's notice was sufficient to entitle the plaintiff to recover. In Peacock v. Ruffin, 6 Esp. 4, the court remarked that a week's notice to quit was certainly sufficient where the holding was

indeed, any covenant that is not inconsistent with the character of such a tenancy.' But all covenants inconsistent therewith, or for the doing of that which is not usually done by such tenants, as to paint once in three years,' or to put the premises in repair before he goes into possession,' will be rejected as inconsistent.'

SEC. 25. **Void lease. Payment of rent under the effect of.**—The same rules and principles apply in the case of a tenant entering into possession of premises for a term of years under a void lease, as apply in the case of an entry under an agreement for a lease. A person entering under such a lease, void for any cause, who pays or agrees to pay any part of the yearly rent reserved therein, becomes a tenant from year to year, subject to all the covenants and conditions of the lease applicable to such a tenancy, except as to its duration,' and at the end of

weekly. In *Doe v. Scott*, 6 Bing. 362, the same rule was recognized, and being incorporated in the text books of authority, may be considered as settled, both in England and in this country, excepting where the matter of notice has been the subject of the statutory regulation. *Prindle v. Anderson*, 19 Wend. (N. Y.) 391; *Seem v. McLees*, 24 Ill. 192; *Walker v. Sharpe*, 14 Allen (Mass.) 43. In the principal case it is also held, that while a notice must be to quit at the end of one of the recurring periods of holding, one to quit on the day corresponding with the date of letting and entry is sufficient. So in *Waters v. Young*, 11 R. I. 1; 23 Am. Rep. 409, where the date of letting by the month was December 18, notice to vacate on or before January 17 was held bad. It should have been "on or before January 18." See, as to this point, *Wilcox v. Wood*, 9 Wend. (N. Y.) 345; *Sheets v. Sheldon's Lessee*, 2 Wall. (U. S.) 177; *Pugh v. Duke of Leeds*, Cowp. 714; *Doe v. Lumby*, 2 Esp. 635; *Kemp v. Derrett*, 8 Camp. 510; *Roe v. Ward*, 1 H. Black. 97; *Doe v. Weller*, 7 Term R. 478; *Mills v. Goff*, 14 M. & W. 72; *Doe v. Bayley*, 5 C. & P. 67.

¹ *Thomas v. Parker*, 1 H. & N.

669; *Bridges v. Potts*, 17 C. B. N. S. 314; *Berry v. Lindley*, 3 M. & Gr. 514.

² *Pinero v. Judson*, 6 Bing. 210-11.

³ *Ibid.*

⁴ *Bowes v. Croll*, 6 E. & B. 264.

⁵ *Strong v. Crosby*, 21 Conn. 398, *Thurber v. Dwyer*, 10 R. I. 355. In *Schuyler v. Leggett*, 4 Cow. (N. Y.) 60, a parol demise was made for seven years which was void under the Statute of Frauds, but the tenant having entered into possession and paid rent under it, it was held that it inured as a tenancy from year to year, and that it regulated the terms of the tenancy in all other respects except the term of the tenancy, such as the amount of rent to be paid, the time of the year when the tenant must quit, &c. See also *People v. Rickert*, 8 Cow. (N. Y.) 226. In New York, a tenancy at will is treated as a tenancy from year to year, so far as is necessary for the purpose of a notice to eject. *Bradley v. Covel*, 4 Cow. (N. Y.) 349. In Massachusetts, and in several of the States, it is held that all tenancies under parol leases are void, and are mere tenancies at will. *Ellis v. Paige*, 1 Pick. (Mass.) 43; *Withers v. Larabee*, 48 Ma. 570.

the void term, the tenancy ceases without any notice to quit, by efflux of time,¹ or it may be previously ended by notice to quit at the end of any year, or by an entry of the landlord for a forfeiture.²

SEC. 26. **Holding over and paying rent.**—If, when premises are let for a year, or from year to year, the tenant holds over, the landlord may elect to treat him as a tenant from year to year, or when the renting is for a shorter period, and the tenant holds over, he will be deemed to hold upon the terms upon which he entered, and the landlord may recover rent of him according to the terms of the original contract or lease,³ or the landlord may at his

In Tennessee they are treated either as creating a tenancy at will or from year to year, according to the circumstances. *Duke v. Harper*, 6 Yerg. (Tenn.) 280, and in Pennsylvania, a tenancy at will is treated as a tenancy from year to year, and the same notice to quit is required in either case. *Clark v. Smith*, 25 Penn. St. 187. Holding that an entry under void lease and payment, &c., of rent creates tenancy from year to year upon the terms of the lease, see *Tress v. Savage*, 4 E. & B. 36; *Martin v. Watts*, 7 T. R. 83; *Riggs v. Bell*, 5 id. 471; *Davenish v. Moffatt*, 15 Q. B. 257; *Doe v. Collings*, 7 C. B. 939; *Pennington v. Taniere*, 12 Q. B. 998; *Lee v. Smith*, 9 Exchq. 662; *Richardson v. Gifford*, 1 Ad. & El. 52; *Beale v. Sanders*, 8 Bing. N. C. 850; *Clayton v. Blakely*, 8 T. R. 8.

¹ *Tress v. Savage*; *Doe v. Stratton*, 4 Bing. 446; *Davenish v. Moffatt*, 15 Q. B. 257.

² *Thomas v. Parker*, 1 H. & N. 669; *Hayne v. Cumming*, 16 C. B. N. S. 421.

³ *Noel v. McCravy*, 7 Coldw. (Tenn.) 623; *Hall v. Myers*, 43 Md. 446; *Burbank v. Dyer*, 54 Ind. 392; *Parker v. Hollis*, 50 Ala. 411; *Usher v. Moss*, 50 Miss. 208; *Gardner v. Commissioners, &c.*, 21 Minn. 33; *Hoof v. Ladd*, 1 Cr. (U. S. C. C.) 167; *Bacon v. Brown*, 9 Conn. 384; *Frantz v. Wood*, 2 Hill (S. C.) 367; *Haskins v. Pope*, 10 Ala. 493; *Quinette v. Carpenter*, 35

Mo. 502; *Laguereane v. Dougherty*, 35 Penn. St. 45; *Hyatt v. Griffiths*, 17 Q. B. 505; *Hollingsworth v. Stennett*, 2 Esp. 717; *Thomas v. Amey*, 12 Ad. & El. 746; *Digby v. Atkinson*, 4 Camp. 275; *Finch v. Miller*, 5 C. B. 428; *Pierce v. Shaw*, 2 M. & R. 418; *Schuyler v. Smith*, 51 N. Y. 309. A tenant who has leased premises for a year took them for a second on the expiration of the first year. It was held, that if the second lease was void, from want of authority of the lessee, an officer of a corporation, and if the tenant should be regarded as holding over under the terms and conditions of the former lease, he became a tenant from year to year, and must give six months' notice to determine his tenancy; and that if he should be regarded as having entered under the void lease, possession under it, and payment and acceptance of rent would create a tenancy from quarter to quarter, not to be determined without three months' notice. A lessee for years whose term depends on a certainty, who holds over after the termination of the lease merely to remove his goods and chattels, none the less becomes a tenant from year to year by such holding over. A tenant for years whose term depends on a certainty, has no right to remain a reasonable time after his term expires for the purpose of removing his chattels. To entitle a landlord to regard a tenant under

election treat him as a trespasser and may bring ejectment against him without any previous notice, unless the holding over has been for such a time that it may be presumed that he assented thereto.¹

But this is only a presumption of law, which stands until the contrary is shown,² and it may be shown that the landlord accepted the rent under a mistake and in ignorance of the facts,³ or that the holding was in a character and for a purpose inconsistent with a tenancy.⁴ An implied tenancy from year to year will be presumed to have commenced on the same day of the year as the original tenancy; but this is sometimes a question for the jury, upon a consideration of all the facts.⁵ Although a parol lease for more than one year is invalid under the Statute of Frauds, in most of the States, yet, if a person enters into possession under a parol lease for four years, and holds over into a second year, he becomes a tenant from year to year upon the terms of the parol lease, and so continues as long as he remains in possession without any new or other agreement, and an occupancy, by having a portion of his property upon the premises, is sufficient to establish his liability, although there is no personal occupancy. Thus, where the defendant went into possession, under a parol lease,⁶ of a brick-yard and dwelling house for one year, with the privilege of four years, at his option, and continued in possession for two years, it was held that, although the lease was void as to

a demise for a year or more, as a tenant from year to year upon his holding over after the expiration of his term, it is not necessary that the holding over should be of such a character as to raise a presumption that the tenant intends to occupy. *Witt v. Mayor, &c.*, of New York, 6 Rob. (N. Y.) 441.

¹ *Smith v. Littlefield*, 51 N. Y. 539; *Blain v. Everett*, 36 Md. 73; *Hemphill v. Flynn*, 2 Penn. St. 144; *Jackson v. Salmon*, 4 Wend. (N. Y.) 327; *Brown v. Keller*, 32 Ill. 151; *Crommelin v. Theiss*, 81 Ala. 412; *Schuyler v. Smith*, 51 N. Y. 309.

² *Quinette v. Carpenter*, 35 Mo.

502; *Frantz v. Wood*, ante; *Darrell v. Stevens*, 4 McCord (S. C.) 59; *DeYoung v. Buchanan*, 10 G. & J. 149; *Dellar v. Roberts*, 13 S. & R. (Penn.) 60; *Brewer v. Knapp*, 1 Pick. (Mass.) 332; *Moore v. Beasley*, 3 Ohio, 294; *Mayor of Thetford v. Tyler*, 8 Q. B. 95.

³ *Lord v. Crago*, 6 C. B. 90; *Oakley v. Monck*, 3 H. & C. 706; *Clemett v. Bradbee*, 1 B. C. Rep. 65.

⁴ *Williamson v. Paxton*, 18 Gratt. (Va.) 475.

⁵ *Walker v. Godé*, 6 H. & N. 594; *Oakley v. Monck*, 3 H. & C. 714.

⁶ *Dorr v. Barney*, 12 Hun (N. Y.) 259.

the four years, yet, by the entry of the defendant and his holding over after the first year, it became a lease from year to year, subject to all the terms and conditions of the verbal lease, except as to the term. He went into possession in June, 1857, and in April, 1869, substantially told the plaintiff that he intended to leave at the end of that year, and at the end of the year he abandoned the house and removed *most* of the brick, but he left a portion of it in a shed which he had erected upon the premises to protect the brick from the effects of the weather, and did not remove it until some time afterwards. The lease was never surrendered, nor did the plaintiff ever give his assent to the brick and shed being left there. The court held that the fact that the brick and shed were left upon the premises by the defendant, after the expiration of the second year, operated as such a continuance of his occupancy as to enable the landlord to treat him as a tenant for another year.¹ The question as to whether the holding is upon the terms of the former lease, depends upon the circumstance whether a new agreement has been entered into, or the tenant has received notice that, if he remains, he must do so upon certain other terms.² But upon principle, it would seem that, after a tenancy from year to year has actually set in, the terms of the tenancy cannot be changed by a mere notice, or by any notice except such as would be operative as a notice to quit, unless such terms are accepted. Where a tenant holds over with an understanding between him and the landlord that it is only for a brief period, the landlord cannot hold the tenant liable for the rent for another year.³

¹ See also to same effect, *Schuyler v. Leggett*, 2 Cow. (N. Y.) 68; *Lounsbury v. Snyder*, 31 N. Y. 514; *Schuyler v. Smith*, 51 id. 309; *People v. Rickert*, 8 Cow. (N. Y.) 226; *Reader v. Sayre*, 6 Hun (N. Y.) 564; *Conway v. Starkweather*, 1 Den. (N. Y.) 113, and, where the tenant holds over, see, holding that the terms of the former lease control, *Stoppelkamp v. Manyeat*, 42 Cal. 316; *Thiebaud v. Vevay*, 42 Ind. 212; *Hall v. Myers*, 43 Md. 446; *Bright v. McOuat*, 30

Ind. 521. But, it may be shown that the holding is really upon different terms, either wholly or in part, *Hunt v. Bailey*, 39 Mo. 257; *Despard v. Walbridge*, 15 N. Y. 374; *Mark v. Bent*, 5 Hun (N. Y. S. C.) 28.

² *Hunt v. Bailey*, 39 Mo. 257; *Despard v. Walbridge*, ante; *Mack v. Bent*, ante.

³ *Pickett v. Bartlett*, 13 Daly (N. Y. C. P.) 229; *Smith v. Alt*, 7 id. 492.

SEC. 27. *Determination of tenancy from year to year.* When determinable.—A tenancy from year to year may be determined by either party at the end of the first or any subsequent year;¹ unless, in creating the tenancy, the parties use expressions showing that they contemplate a tenancy for two years at least.² A tenancy “for one year certain, and so on from year to year,” cannot be determined before the end of the second year.³

SEC. 28. *Notice to quit.* Where there is no express agreement.—Where no express stipulation is made between the parties as to the length of notice required to be given, it seems that this may be regulated by custom;⁴ but there must be strong evidence of such custom,⁵ and the tenant takes the onus of establishing it,⁶ which must be shown by facts, rather than by the opinions of witnesses,⁷ and, if the custom is not general, it must be shown to exist in the particular locality to which it is sought to apply it, and proof of a custom in an adjoining town is not sufficient.⁸

If no such custom exists, it is a general presumption of law that if an estate from year to year is created, and nothing is said about determining it, the notice intended is half a year's notice, expiring at the end of some current year of the tenancy.⁹

¹ Doe v. Smaridge, Q. B. 957; Thompson v. Maberly, 2 Camp. 573.

² Doe v. Smaridge, 7 Q. B. 959. See Denn v. Cartwright, 4 East 29; Doe v. Mainby, Q. B. 473; Chadburn v. Green, 9 Ad. & El. 658.

³ Doe v. Green, 9 Ad. & El. 658; Reg. v. Chawton, 1 Q. B. 247. See Jones v. Nixon, 1 H. & C. 43.

⁴ Roe v. Wilkinson, cited in note 228 to Co. Litt. 270 b. See Roe v. Charnock, Peake, N. P. C. 4; also judgment in Doe v. Snowdon, 2 W. Bl. at p. 1225.

⁵ Roe v. Charnock, Peake 5; Caldecott v. Smythers, 7 C. & P. 808; Tyler v. Seed, Skin. 649; Brown v. Wilkinson, Co. Litt. 270 b. note.

⁶ Caldecott v. Smythies, 7 C. & P. 108.

⁷ Henderson v. Charnock, ante.

⁸ Brown v. Wilkinson, ante.

⁹ Judgment of EARLE, C. J., in Bridges v. Potts, 17 C. B., N. S. 332; Hall v. Myers, 43 Md. 581; Hanchett v. Whitney, 1 Vt. 315. Cole on Ejectment 33; Smith's L. & T. 319; Murray v. Armstrong, 11 Miss. 209; Hamitt v. Lawrence, 2 J. K. Mar. (Ky.) 366; Darrell v. Johnson, 17 Pick. (Mass.) 263; Bedford v. McEherron, 2 S. & R. (Penn.) 49; Whitney v. Gordon, 1 Cush. (Mass.) 266; Allen v. Jaquish, 21 Wend. (N. Y.) 261; Clapp v. Paine, 18 Me. 264; Goddard v. R. Co., 2 Rich. (S. C.) 348; Goade v. Howell, 4 M. & W. 198; Walker v. Constable, 3 Wils. 279; Braner v. Wilkinson, Co. Litt. 270 b. note; Flower v. Darby, 1 T. R. 159; Pitcher v. Donovan, 1 Taunt. 555;

There is some uncertainty as to the length of the notice required to determine a quarterly, monthly, or weekly tenancy. It does not appear to have ever been decided, that in the case of an ordinary monthly or weekly tenancy, a month's or week's notice to quit must be given. A tenant who enters upon a fresh week may be bound to continue until the expiration of that week, or to pay the week's rent; but that is a very different thing from giving a week's notice to quit.¹ A weekly tenancy cannot, generally, however, be determined without some² notice, and the safest course is to give a notice corresponding to the letting, *i. e.*, a week's notice in a weekly letting, and a month's notice in a monthly letting.³

SEC. 29. Where there is an express agreement.—The parties to the tenancy may alter the notice necessary to determine it; thus, they may agree that a three months' notice, or even a week's notice, shall be sufficient,⁴ and they may also stipulate that the notice shall expire at any period of the year.⁵

Shore v. Porter, 3 T. R. 13; *Martin v. Coutts*, 7 id. 85. In many of the States the common-law requirement as to the length of notice required has been materially changed by statute, being fixed in some at thirty days. *Larkin v. Avery*, 23 Conn. 304, three months, &c., but in all of them the rule remains the same as to the time when the tenancy can be so ended, to wit, at the end of the current year. *Prescott v. Elm*, 7 Cush. (Mass.) 346. In others the right to notice is mutual, and either the landlord or tenant desiring to end the tenancy, must give the requisite notice. *Morehead v. Watkins*, 5 B. Mon. (Ky.) 223; *Grant v. White*, 42 Mo. 285. In New Jersey, a half-year's notice is required in all cases of uncertain tenancy, whether from year to year or at will. *Den v. Drake*, 14 N. J. L. 523. In all the States, except where otherwise provided by statute, the common-law rule prevails.

¹Per PARKE, B., in *Hoffell v. Armitstead*, 7 C. & P. 58. But see *Doe v. Hazel*, 1 Esp. 94; *Doe v.*

Ruffin, 6 Esp. 4. In Wisconsin, the statute relating to notice to quit in cases of a tenancy at will or by sufferance, does not apply to a tenancy from year to year. The common-law rule applies to the latter, *Brown v. Keyes*, 60 Wis. 1. ²*Jones v. Mills*, 10 C. B., N. S. 788, 796.

³See per WILLIAMS, J., in *Jones v. Mills*, 10 C. B., N. S., 798. In Illinois, by statute of 1861, a tenancy from month to month can only be terminated by a month's notice. *Seem v. McLees*, 24 Ill. 192. In Massachusetts, no such notice is required. *Shorey v. Farrell*, 114 Mass. 441; nor in New York, *Gibbons v. Dayton*, 4 Hun (N. Y. S. C.) 451; *People v. Shackno*, 48 Barb. (N. Y.) 55. In Michigan, monthly tenants are entitled to a month's notice. *Huyser v. Chase*, 13 Mich. 98.

⁴Judgment of EARLE, C. J., in *Bridges v. Potts*, L. J., C. P. 343.

⁵See *Bridges v. Potts*, 17 C. B., N. S. 333; *Doe v. Grafton*, 18 Q. B. 496; *Collett v. Curling*, 10 Q. B. 785.

Where there is no express or implied stipulation, the notice agreed upon between the parties must be given so as to expire at the end of some current year of the tenancy.

Thus, an agreement by a tenant from year to year to quit at a quarter's notice, means a quarter's notice expiring at the end of some year of the tenancy,¹ and the same rule applies to implied as to express tenancies.²

SEC. 30. *Period with reference to which notice must be given.*—The implied condition as to the notice expiring at the end of some year of the tenancy renders it important that the time of commencement of the tenancy should be correctly ascertained and the question, at what period a tenancy began, is a matter for the decision of a jury upon a consideration of all the facts.³ If the tenant alleges that a notice to quit given to him does not correspond with the time at which his tenancy commenced, it is incumbent on him to prove the true time of commencement.⁴

When the lease provides for thirty days' notice, or any other period, whether more or less than that required by law, it must be given,⁵ but while less notice than that stipulated for is insufficient, yet, the tenant cannot complain because *more* is given.⁶ In the first case cited in in the last note, it was held that, where it was provided that six months' notice should be given, a notice for six lunar months was good. In North Carolina, three months' notice to quit must be given to a tenant from year to year.⁷ In Missouri, ten days' notice must be given by a landlord before instituting proceedings to obtain possession.⁸ Where a person *denies* that he is a tenant, no

¹ Doe v. Donovan, 1 Taunt. 555; 2 Camp. 78; Kemp v. Derrett, 3 Camp. 510. See Bridges v. Potts, 17 C. B., N. S., 383.

² Collins v. Weller, 7 T. R. 478; Wawn v. Horn, 3 M. & W. 333; Beale v. Saunders, 3 Bing. N. C. 580; Cater v. Somerville, 6 B. & P. 126; Potter v. Archer, 1 B. & P. 581; Bowes v. Croll, 6 E. & B. 255; Bishop v. Howard, 2 B. & C. 100; Spicer v. Lea, 11 East, 312; Plumer v. Nainby, 10 Q. B. 473; Thomas v. Packer, 1 H. & N. 669.

³ Walker v. Gode, 6 H. & N. 594.

⁴ Doe v. Wrightman, 4 Esp.

⁵ See previous note.

⁶ Rogers v. Kingston-upon-Hull Dock Co., 84 L. J. Ch. 165; Peacock v. Raffan, 6 Esp. 4; Davenish v. Moffatt, 15 Q. B. 257; Richardson v. Gifford, 1 Ad. & El. 52.

⁷ Vincent v. Corbin, 85 N. C. 108.

⁸ Johnson v. Douglass, 73 Mo. 168, and this requires ten days exclusive of the day of service. Thus, where a notice is served on the 18th, a suit commenced on the 28th is premature.

notice is necessary ' nor where the term expires at a fixed date.' In Illinois, a month's notice is required in case of a tenancy from month to month.'

SEC. 31. *Admission by tenant.*—When a tenant, on being applied to respecting the commencement of his holding, informs the person making the inquiry that it begins on a certain day, and notice to quit on that day is given at a subsequent time, the tenant will not be allowed to set up a holding from a different day. It makes no difference whether the information so given proceeds from mistake or design.' The mere notice to quit at a certain time, given by the landlord, is not, in itself, evidence of a holding from that time; ' but if it is served personally on the tenant, and he makes no objection at the time, this is *prima facie* evidence from which a jury may find that the tenancy commenced at the period specified in the notice.' The tenant, however, is not precluded

¹ Eberwine v. Cook, 74 Md. 377.

² Alcom v. Morgan, 77 Md. 184.

³ Eberlein v. Abel, 10 Ill. App. 626. Where a term properly ends at midnight of April 30, a notice to quit on May 1, is good. Detroit Savings Bank v. Bellamy, 49 Mich. 317. Notice to quit, where premises are held from month to month, must be given a full month before the day on which a new holding would begin. When such holding begins on the first of the month, a notice given May 6 would not be operative until July 1. Hart v. Lindley, 50 Mich. 20. A tenant in possession, who has attorned to a stranger to the title, is not entitled to notice to quit. Steinhäuser v. Kuhn, 50 Mich. 367. Where, in a case of tenancy at will, to notice to quit having been given, the landlord and tenant agree that the latter shall leave the premises on a day named, within the time in which the tenancy might be terminated by notice, it is a valid agreement, changing the tenancy to one for a fixed term, and the giving up by each, of his right to hold the other to the tenancy beyond the day named, is a sufficient consideration to sustain it. Engels v. Mitchell, 30 Minn. 123. Seven days' notice to quit is not

sufficient, unless the precise amount of rent due has been demanded and its payment refused. Nowell v. Wentworth, 58 N. H. 319. The occupant of land merely under a license is not entitled to a notice to quit. Johns v. McDaniel, 60 Miss. 486. After expiration of a parol tenancy of a year, the tenant remained for several years, under a verbal agreement that he should go when requested by the landlord. Held, that his tenancy was either a tenancy at will, or one from year to year, and that, in either case, he was entitled to a notice to quit before a suit could be brought against him for the possession of the premises. Coomler v. Hefner, 86 Ind. 108. The notice to leave required by Neb. Comp. St. p. 648, to be served three days before the commencement of an action for forcible entry and detention, may be served as well before as after the expiration of the term. Hawley v. Robeson, 14 Neb. 435.

⁴ Doe v. Lambley, 2 Esp. 635.

⁵ Per LORD ELLENBOROUGH, C. J., in Doe v. Forster, 13 East, 406.

⁶ Doe v. Forster, 13 East, 405; Thomas v. Thomas, 2 Camp. 647; Doe v. Biggs, 2 Taunt. 109.

from afterwards insisting on the insufficiency of the notice.¹

SEC. 32. Where tenant keeps possession after expiration of lease.—Where a tenant continues in possession after the expiration of his lease, without having entered into any new contract, he holds upon the former terms as to the time of quitting.² If he assigns his interest, the tenancy of the assignee will also be held to commence on the same day as the original lease.³

SEC. 33. Where tenant enters under a void or parol lease.—

A void lease or agreement, under which a tenant has entered and paid rent, will regulate the terms on which the tenancy subsists, as to the time of the year when a tenant is to quit.⁴ Parol evidence is admissible to show to what the lease applies, or what premises are embraced in it, where there is no sufficient description in the lease itself; and this applies as well in the case of valid, as of a void lease. Thus, in a case where a person sold a quantity of hay to the defendant, and receiving payment, made out a receipted bill therefor as follows: "P., bought of H." &c., and added thereto, "left at stable on O street, where P. takes possession. Rent to begin October 1, 1870, for one year at \$150," it was held that this was a lease, and that oral evidence was admissible to show that the demised premises consisted of a lot of land on which was a stable and a small house which had been occupied by the groom of the vendor of the hay, and that the defendant took possession of the whole premises under the lease.⁵ Where a parol lease of premises is made, and the lessee enters under it, but during his entire occupancy repudiates the lease, yet, having enjoyed the use of the premises, the landlord may, at his option, seek his remedy upon the lease, or he may sue for use and occupation,⁶ and in the

¹ Oakapple v. Copous, 4 T. R. 361.

² See judgment in Doe v. Bell, 5 T. R. 472; Roe v. Ward, 1 H. Bl. 96; Doe v. Weller, 7 T. R. 478. See Doe v. Dobell, 1 Q. B. 806; Humphreys v. Franks, 18 C. B. 323.

³ Doe v. Samuel, 5 Esp. 173.

But see Doe v. Lines, 11 Q. B. 402.

⁴ Riggs v. Bell, 5 T. R. 471.

⁵ Eastman v. Perkins, 111 Mass. 80.

⁶ Scott v. Hawsman, 2 McLean (U. S.) 180.

latter case the amount agreed upon in the parol lease as rent, will control as to the amount of recovery. Generally, in most of the States, a lease for a year may be made by parol, and in some of the States, a parol lease for three years is good. In order to ascertain whether a parol lease for a certain term is valid or not, reference should be had to the Statute of Frauds. If the void lease or agreement contains no express stipulation on this subject, the tenancy from year to year will be determinable by notice to quit, expiring at the time of the original entry of the tenant.¹

SEC. 34. Where tenant enters on different parts of demised premises at different times.—In cases where the incoming tenant enters upon different parts of the demised premises at different times, it is sufficient to give half a year's notice to quit before the substantial time of entry; ² i. e., the time of entry on the principal part of the premises. In these cases the question of what is the principal and what the accessory, must depend upon the relative value and importance of the premises let together, and is a matter for the decision of a jury.³

SEC. 35. Where tenant enters between two quarter days.—Where a tenant from year to year, having entered in the middle of a quarter, pays rent to the next quarter-day, and thenceforth from quarter to quarter, his tenancy is held to commence on the quarter-day after his entry.⁴

Where he has not paid rent for the fraction of a quarter, the period of his entry is taken to be the time of commencement of his tenancy.⁵

SEC. 36. When notice to quit is indispensable, and when not.—A notice to quit is indispensable in all cases where a

¹ See judgment of COLTMAN, J., in *Berrey v. Lindley*, 8 M. & Gr. 498.

² See judgment of LORD ELLENBOROUGH, C. J., in *Doe v. Watkins*, 7 East, 555; *Doe v. Snowden*, 2 W. Bl. 1224; *Doe v. Spence*, 6 East, 120, 122; *Doe v. Hughes*, 7 M. &

W. 189; *Doe v. Rhodes*, 11 M. & W. 600.

³ *Doe v. Howard*, 11 East, 498, 501.

⁴ *Doe v. Johnson*, 6 Esp. 10; *Doe v. Stapleton*, 3 C. & P. 275.

⁵ *Doe v. Matthews*, 11 C. B. 675.

tenancy from year to year exists, unless expressly waived by a writing under the hands of the parties, and the fact that the estate comes into the possession of an infant as reversioner, does not obviate the necessity of giving the usual notice,¹ and the fact that the tenant paid rent to an infant, during his minority, or that he went into possession under a lease given by an infant, does not enable the infant, upon attaining his majority, to maintain ejectment, unless the usual notice has first been given.² The husband of a *feme covert*, must give the usual notice to quit, before he can maintain ejectment against such a tenant, even though the tenant went into possession under a lease executed by the wife alone, and without the husband's assent,³ and an heir, executor, or administrator, after the death of the lessor or lessee must, in order to terminate the tenancy, give such notice as the lessor or lessee would have been required to give,⁴ and so must the assignor of the reversion⁵ or of the term.⁶ A notice to quit, however, need not be given to terminate a tenancy, the duration of which is limited in the lease itself, as, if a lease is given for one, two, or any number of years, the parties are both apprised of the determination of the estate, and it expires by efflux of time,⁷ nor where the tenancy is to be determined upon the happening of a certain event, as, where a tenant agrees to quit, if the premises are sold during the term, notice only of the fact of a *bona fide*

¹ *Baker v. White*, 2 T. R. 159; *Manning v. Deuer*, 85 Q. B. (Ont.) 294; *Campbell v. Baxter*, 15 C. P. (Ont.) 42; *Bouter v. Frazer*, 4 O. S. (Ont.) 80; *Sheldon v. Sheldon*, 22 Q. B. (Ont.) 621; *Osborne v. Earnshaw*, 12 C. P. (Ont.) 267; *Cartwright v. McPherson*, 20 Q. B. (Ont.) 251; *Somers v. Bullen*, 6 Q. B. (Ont.) 369.

² *Miller v. Maden*, 2 Esp. 530.

³ *Leicester v. Biggs*, 1 Taunt. 367.

⁴ *Baker v. White*, ante; *Tasker v. Burr*, 1 W. Bl. 596; *Hull v. Wood*, 14 M. & W. 682; *Mackay v. Mackreth*, 15 Ves. 241.

⁵ *Burrows v. Graden*, 1 D. & L. 213; *Birch v. Wright*, 1 T. 378.

⁶ *Castleton v. Samuel*, 5 Esp. 178; *Armitage*, ante. If the rule was otherwise, the tenancy would generally continue for a double period. But the question as to whether notice is necessary or not, depends upon the fact whether the tenancy is really from week to week, &c., or whether there is an express or implied contract between the parties that notice shall be given. *Flower v. Darby*, 1 T. R. 162.

⁷ *Leeson v. Sayer*, 3 Camp. 8; *Cobb v. Stokes*, 8 East, 358; *Hendrick v. Cannon*, 5 Tex. 248; *Messenger v. Armstrong*, 1 T. R. 54; *Strickland v. Maxwell*, 2 Cr. & M. 539; *Godsell v. Inglis*, 3 Taunt. 54.

sale is necessary,¹ or if a lease is given so long as the landlord lives,² or "during the continuance of the partnership between A and B,"³ or so long as the tenant remains in the employ of B.;⁴ in all these cases, the estate terminates upon the happening of the event specified. So, even where a tenant enters under an agreement for a lease for a certain time, and no lease is ever executed, his term expires at the end of the term for which the lease was agreed to be given,⁵ but if the agreement is for a lease for a certain definite term, as, for twenty-one years, determinable at the end of seven or fourteen years by notice to quit, unless such notice is given, the estate continues for the full term,⁶ but a notice once given is good, although the tenant has been permitted to remain for a year after it was given,⁷ unless the landlord accepts rent for the period of occupancy specified in the notice.⁸ As previously stated, when the tenant goes in under a lease for a definite term, as for a week, month, quarter, or a year, his estate ceases without notice, when the term is ended,⁹ but if he holds over with the landlord's assent, which may be implied from his silence, he becomes a tenant from year to year, and the usual notice becomes necessary to terminate the new tenancy.¹⁰ Notice is not necessary, in the absence of any local custom, or of a statute, in the case of a weekly, monthly or quarterly tenancy, as in such cases the tenancy is regarded as for a week, month or quarter, rather than as a tenancy from week to week,

¹ *Millan v. Kephart*, 18 Gratt. (Va.) 1. See also *Bithell v. Blencowe*, 3 M. & G. 119.

² *Broomfield v. Smith*, 6 East, 530.

³ *Colnaghi v. Black*, 8 C. & P. 464.

⁴ *Huges v. Corbett*, 9 C. & P. 494; *Butler v. Rice*, 24 N. Y. S. C. 406.

⁵ *Stockwell v. Marks*, 17 Me. 455; *Tress v. Savage*, 4 E. & B. 36; *Tilt v. Stratton*, 3 C. & P. 164; *Berrey v. Lindley*, 3 M. & G. 498; *Jackson v. McLeod*, 12 John. (N. Y.) 182; *Young v. Smith*, 28 Mo. 65; *Moshier v. Reding*, 12 Me. 478; *Donnell v. Johnson*, 17 Pick. (Mass.) 263.

⁶ *Brown v. Trumper*, 26 Beav. 11;

Chapman v. Towner, 6 M. & W. 100.

⁷ *Boggs v. Black*, 1 Binn. (Penn.) 333.

⁸ *Collins v. Carty*, 6 Cush. (Mass.) 415; *Doe v. Batten*, Camp. 243.

⁹ *Preble v. Hay*, 32 Me. 456; *Lithgow v. Moody*, 35 id. 314; *Logan v. Herron*, 8 S. & R. (Penn.) 459; *Hamit v. Lawrence*, 2 A. K. Mar. (Ky.) 366; *Clapp v. Paine*, 18 Me. 264; *Allen v. Jaquish*, 21 Wend. (N. Y.) 628. As to weekly tenancies, see *Huffell v. Armistead*, 7 C. & P. 56; *Wilson v. Abbott*, 3 B. & C. 88; *Towne v. Campbell*, 3 C. B. 920.

¹⁰ *Moshier v. Reding*, 12 Me. 478.

&c.¹ Notice is not necessary when a mortgagor holds possession after the mortgagee is entitled thereto; in such case the mortgagee or those claiming under him, may enter without either notice or demand of possession, 'and in the absence of any statute to that effect, such is the case in the case of a tenancy at will' or by sufferance.' A mere intruder is not entitled to notice,² nor one who claims to hold by title paramount,³ or who denies the landlord's title.'

SEC. 37. *Form of notice.*—Where any doubt exists as to the period at which the current year of the tenancy expires, the notice to quit may be expressed in general terms, requiring the tenant to quit at the end of the current year of his tenancy, which shall expire next after the end of one half-year from the date of the notice.'

It is not essential that a notice to quit should be in writing,⁴ or that it should state to whom possession is to be delivered up.⁵ It must, however, be expressed with reasonable certainty, not giving an option to the tenant to

¹ *Wilson v. Abbott*, ante; *Huffell v. Armistead*, ante. Where the tenancy is really from week to week, &c., it is certainly much safer to give reasonable notice, which never need to exceed the period of tenancy. *Jones v. Mills*, 10 C. B. N. S. 788. If a custom to give notice in the case of such tenancies prevails, it must be followed. *Henderson v. Charwick*, Peake, 6; *Tyler v. Seed*, Skin. 649. In *Huffell v. Armistead*, 7 C. & P. 56, it was held that a weekly tenant, whose tenancy commenced on Saturday, might leave without notice on the succeeding Saturday, but generally, if a weekly tenant holds over into a fresh week, he is liable for the rent for such week. When a notice in the case of such tenancies is necessary, it must be of the duration of the term, and expire on the last day thereof. *Jones v. Mills*, ante; *Perry v. Hazell*, 1 Esp. 94; *Finlayson v. Bayley*, 5 C. & P. 67.

² *Garrod v. Olley*, 12 Ad. & El. 481; *Roby v. Maisey*, 8 B. & C.

767; *Wilkinson v. Goodier*, 10 Q. B. 557; *Fisher v. Giles*, 5 Bing. 421; *Snell v. Tom*, 4 Q. B. 615.

³ *Gallaway v. Herert*, 4 T. R. 680; *Jacobs v. Phillips*, 10 Q. B. 130; *Brane v. Rawlins*, 10 East, 261. See chap. on Tenants at Will, ante.

⁴ *Leeson v. Sayer*, 3 Camp. 8; *Moore v. Lawder*, 1 Stark. 380. See Chap. on Tenants by Sufferance.

⁵ *Knight v. Quigley*, 2 Camp. 205.

⁶ *Putland v. Hilder*, 2 B. & Ald. 782.

⁷ *Ramsey v. Henderson*, (Mo.) 10 West'n. Rep. 33; *Payton v. Steth*, 5 Pit. (U. S.) 485; *Willson v. Watkins*, 3 id. 48; *Smith v. Ogg*, Shaw 16 Cal. 88; *Bolton v. Landers*, 27 id. 104.

⁸ *Doe v. Butler*, 2 Esp. 589; *Doe v. Steel*, 3 Camp. 117; *Doe v. Smith*, 5 Ad. & El. 850; *Doe v. Timothy*, 2 C. & K. 351; *Hanchett v. Whitney*, 1 Vt. 315.

⁹ *Doe v. Crick*, 5 Esp. 196; *Bird v. Defonvielle*, 2 C. & K. 415; *Roe v. Pierce*, 2 Camp. 96.

¹⁰ *Doe v. Foster*, 3 C. B. 215.

quit or to do something else.' A notice to quit on one of two days is good, if served six months before the day of which the tenancy commenced.' An error in the description of the premises will not invalidate the notice if the person to whom it is given has not been misled by it,' and a mistake in the Christian name of the tenant will not be fatal if the notice is kept by him without objection.' A notice to quit a part only of premises leased together, is void.'

SEC. 38 By and to whom notice may be given.—The notice may in all cases be given by either landlord or tenant, or the person legally entitled to the reversion or the term. The notion, thrown out by LORD MANSFIELD, of a tenancy from year to year, in which the lessor binds himself not to give notice to quit, has been long exploded,' but it may be stipulated, that, upon a particular event, the lessee may quit without notice.' But, if the tenant stipulates that he will leave at any time when required to do so by the landlord, only a tenancy at will exists, although the lease expressly purports to be from

¹See *Doe v. Goldwin*, 2 Q. B. 146. But see *Roberts v. Hayward*, 3 C. & P. 432.

²*Doe v. Wrightman*, 4 Esp. 6.

³*Doe v. Cox*, 4 Esp. 185; *Doe v. Wilkinson*, 12 Ad. & El. 743.

⁴*Doe v. Spiller*, 6 Esp. 70.

⁵*Doe v. Archer*, 14 East 245. A notice to quit, given by, or on behalf of, the landlord, may be in the following form, the words between brackets being used when the notice is by an agent:—
To Mr. C. D.

I hereby [*as agent for and on behalf of Mr. E. F., your landlord*] give you notice to quit and deliver up possession of the premises, situate at—, in the county of—, which you now hold of me [*him*] on the—day of—next, or at the expiration of the year of your tenancy thereof, which shall expire next after the end of one half-year from the date of this notice. Dated the—day of —, 18—. E. F.

[*R. S. agent for the said E. F.*]

Hanchett v. Whitney, ante.

A notice to quit, given by, or on behalf of, the tenant, may be in the following form, the words between brackets being used when the notice is by an agent:—

To Mr. E. F.

I hereby [*as agent for and on behalf of Mr. C. D., your tenant*] give you notice that on the—day, of—next, I shall [*he will*] quit and deliver up possession of the premises situate at—, in the county of—, which I [*he*] now hold [*holds*] of you as tenant thereof. Dated the—day of—, 18—. C. D.

[*R. S., agent for the said C. D.*]

The form is not essential, but in substance, a notice should contain all that is embraced in the forms given.

⁶Per LAWRENCE, J., in *Warner v. Browne*, 8 East, 167.

⁷*Bethell v. Blencowe*. 3 M. & Gr. 119.

year to year.¹ Where a tenant stipulates that he will quit upon proper notice, in case the landlord shall sell the premises, the landlord is not bound to give the usual legal notice required in the case of tenancies from year to year, as it will be presumed that the parties, by the words "proper notice," intended to waive the legal notice, and any notice that distinctly informs the tenant of the sale is "proper notice," without reference to its form or duration. Reasonable notice as to duration is all that can be required in such a case, and as to what is reasonable notice, must depend upon the circumstances of the case, as the nature, character, and purpose of the occupancy.² The notice should be given to the person who is legally entitled to the reversion or the term.³ The notice required, may be given by either party, or by their agent, or by any person for the time being legally entitled to the reversion, or the term,⁴ but where it is given by an agent, or by any other person than the parties themselves, their authority should be established.⁵ An executor, heir, administrator, devisee or assignee of either party may give the notice,⁶ and, after notice is given by a person lawfully empowered to give it, any subsequent owner may avail himself of it.⁷ A notice given by one of several executors or administrators, is good,⁸ but one joint tenant,⁹ or tenant in common,¹⁰ cannot, by a notice given in his own name, give a notice

¹ *Harrison v. Middleton*, 11 Gratt. (Va.) 527.

² In *Millan v. Kephart*, 18 Gratt. (Va.) 1, there was a lease under which the tenant entered, containing a stipulation as stated in the text. The lease had been destroyed before action was brought. The plaintiff sold the premises and notified the tenant of the sale. The court held that it was for the jury to say what the intention of the parties was, and that for the purpose of ascertaining such intent, the whole contract, and not this provision merely, should be considered, and that parol evidence as to what the contract was, might be given. Where the tenant stipulates that

he will quit upon notice in a certain event, the notice will not be good unless it states that such event has happened. *Sloan v. Cantwell*, 5 Cald. (Tenn.) 571.

³ *Cole on Ejectment*, 85.

⁴ *Cole on Ejectment*, 42.

⁵ *Fisher v. Cuthell*, 5 East, 491; *Mann v. Walters*, 10 B. & C. 626.

⁶ *Cole on Ejectment*, 42.

⁷ *Higgs v. Terry*, 4 Ad. & El. 274; *Egremont v. Forwood*, 3 Q. B. 627.

⁸ *Cole on Ejectment*, 43.

⁹ *Whayman v. Chaplin*, 3 Taunt. 120.

¹⁰ *Robertson v. Gardiner*, 12 C. B. 328; *Cutting v. Derby*, 2 W. Bl. 1075.

that will be operative, except as to his own share,' but, if the notice is professedly given for himself and his cotenants, it effectually ends the tenancy.¹ A receiver appointed by a Court of Chancery, or by an individual "with general authority," may give the notice,² but a mere receiver of rents,³ or one appointed for a special purpose, or with only a limited authority, has no such power.⁴ Where notice is given by an agent, it should be given in the name of the principal, or expressly on his behalf.⁵

SEC. 39. *Agents.*—A notice to quit, given by the landlord, must be such as the tenant may safely act on at the time of receiving it;⁶ that is one which is, in fact, and which the tenant has reason to believe to be, then binding on the landlord.⁷ A notice to quit, given without authority will not be made valid by the subsequent adoption or ratification of the landlord.⁸ It is not essential to the validity of a notice to quit, given by a general agent, that his agency should appear on the face of the document. There is, however, a distinction in this respect between a general agent and one having a special or limited authority,⁹ and in the case of the latter, it would appear, that a notice is bad, if it does not state that it is given by authority or in the name of the principal.¹⁰

A *cestui que* trust, who has been permitted for many years by the trustees to have the entire management of the trust estates,¹¹ and a receiver appointed by the Court of Chancery, with a general authority to let lands to tenants from year to year,¹² are deemed general agents,

¹ See last two notes.

² *Alford v. Vickery*, C. & M. 280; *Aslin v. Summersett*, 1 B. & Ad. 137; *Cole on Ejectment*, 44.

³ *Manners v. Mizem*, 2 M. & R. 56; *Wilkinson v. Colley*, 5 Burr. 2697; *Marsack v. Read*, 12 East, 57.

⁴ *Pearse v. Boulter*, 2 F. & F. 133; *Rhodes v. Robinson*, 3 Bing. N. C. 677; *Hasler v. Lemoyne*, 5 C. B. N. S. 550.

⁵ *Mann v. Walters*, ante.

⁶ *Buron v. Denman*, 2 Exchq. 188.

⁷ *Doe v. Goldwin*, 2 Q. B. 143; *Doe v. Walters*, 10 B. & C. 626.

⁸ Judgment in *Jones v. Phipps*, L. R. 3 Q. B. 572.

⁹ *Doe v. Goldwin*, ante.

¹⁰ *Jones v. Phipps*, L. R., 3 Q. B. 572.

¹¹ *Doe v. Goldwin*, 2 Q. B. 143; 10 L. J., Q. B. 275. See Judgment in *Jones v. Phipps*, L. R., 3 Q. B. 572.

¹² *Jones v. Phipps*, L. R., 3 Q. B. 567.

¹³ *Wilkinson v. Colley*, 5 Burr. 2694; *Doe v. Read*, 12 East 57.

and may give valid notices to quit, in their own names. A notice to quit, signed by one of two joint tenants on behalf of the other, is sufficient to put an end to a tenancy from year to year as to both.¹

An assignee of the reversion may avail himself of a notice to quit given by the preceding owner.²

SEC. 40. *To whom given.*—A notice to quit proceeding from the landlord must be served upon the original tenant. Since there is no privity of contract between the landlord and under-tenant, the landlord cannot entitle himself to recover against such under-tenant by giving a notice to quit, in his own name.³

SEC. 41. *Mode of service.*—It is not necessary that the notice should be directed to the tenant, if it can be proved to have been delivered to him in proper time.⁴ It may be either served upon him personally, or upon his attorney;⁵ or it may be left with his wife⁶ or servant at his dwelling-house,⁷ but in this case an explanation of the nature of the notice should be given at the time when it is served.⁸ The service of a notice upon the demised premises on one of two tenants, holding under a joint demise, is presumptive evidence that the notice reached the other.⁹ A notice put under the door of the tenant's house will be valid if it can be proved to have come to the tenant's hands half a year before the expiration of the current year of the tenancy.¹⁰ Where a corporation

¹ Doe v. Summersett, 1 B. & Ad. 135; Doe v. Hulme, 2 Man. & Ry. 434; Doe v. Hughes, 7 M. & W. 139, 141.

² Doe v. Forwood, 3 Q. B. 627.

³ Pleasant v. Benson, 14 East, 234; Schilling v. Holmes, 23 Cal. 227. A lessor served a notice to quit for non payment of rent, by leaving the notice at the lessee's house, off the demised premises, and called the attention of a person, not an agent of the lessee nor a member of his family, to it. This person gave the notice to the lessee the next day. It was held that the leaving of the notice was not a good service on the lessee, and that the

fourteen days prescribed by the Gen. Sta. c. 90 § 30 did not begin to run until the lessee received the notice. Hodgkins v. Price, 137: Mass. 13.

⁴ Doe v. Wrightman, 4 Esp. 5.

⁵ See Doe v. Ongley, 10 C. B. 25.

⁶ Pulteney v. Shelton, v. Ves. 260, note (a.)

⁷ Jones v. Marsh, 4 T. R. 464.

⁸ See Doe v. Lucas, 5 Esp. 153; Smith v. Clark, 9 Dowl. 202.

⁹ Doe v. Watkins, 7 East, 551. See Doe v. Crick, 5 Esp. 196.

¹⁰ Alfred v. Vickery, Car. & M. 280. See Doe v. Hall, 5 M. & Gr. 795.

is the tenant, the notice to quit may be served on one of its officers.¹

If the notice proceeds from the tenant, it should be given to his immediate landlord or to the attorney or agent of such landlord authorized to receive such notices, and not to a mere collector of rents.² When a notice is sent by post to the landlord or his agent, it seems that the day on which the letter is delivered will be considered as the time at which the notice is given.³ It is sufficient if the notice sent by post can be proved to have reached the office of the person on whom it is served at any time during the last day on which service can be made, although after business hours.⁴ At the time of service of a notice to quit, a memorandum of the fact of such service should be endorsed upon a duplicate of the notice.⁵

SEC. 42. Waiver of notice to quit.—If, after the expiration of a notice to quit, the parties by their acts unmistakably acknowledge a subsisting tenancy between them, the notice will be deemed to be waived.⁶

SEC. 43. Second notice to quit.—A second notice to quit is considered an acknowledgment of a tenancy,⁷ unless, under the circumstances of the case, the person to whom it was given would not understand it as waiving the former notice.⁸

SEC. 44. Acceptance of rent. Holding over.—A landlord may waive a notice to quit by accepting either personally,⁹ or by an agent specially authorized to receive it,¹⁰ rent due for the occupation of premises after the expiration of the notice,¹¹ or by distraining for rent accruing thereafter.¹²

¹ Doe v. Woodman, 8 East, 228.

² Pearse v. Boulter, 2 F. & F. 183.

³ See Reg v. Slawstone, 18 Q. B. 388; Reg. v. Recorder of Richmond, E. B. & E. 253.

⁴ See Papillon v. Brunton, 5 H. & N. 518, 522.

⁵ See Doe v. Turford, 3 B. & Ad. 880; Doe v. Somerton, 7 Q. B. 58.

⁶ See Doe v. Palmer, 16 East, 58 6.

⁷ Per LORD ELLENBOROUGH, in Doe v. Palmer, 16 East, 56.

⁸ See judgment in Doe v.

Humphreys, 2 East, 240; Doe v. Steele, 3 Camp, 117.

⁹ Goodright v. Cordwent, 6 T. R. 219.

¹⁰ See Doe v. Calvert, 2 Camp. 387.

Goodright v. Cordwent, ante.

¹¹ See Doe v. Batten, Cowp. 243; Collins v. Canty, 6 Cush. (Mass.) 415.

¹² Zouch v. Willingale, 1 H. Bl. 311. The landlord cannot distrain from such rent, unless a new tenancy has been created; ante, pp 111, 131.

A mere demand of rent, due after the expiration of the notice,¹ or a holding over or accidental detention of the key by the tenant, after that event, does not necessarily operate as a waiver of the notice.²

When a valid notice to quit is given by landlord or tenant, the party to whom it is given is entitled to count upon it, and it cannot be withdrawn without the consent of both parties.³ If such consent is given, there is a new agreement between the parties, and a new tenancy is created which exists only under that new agreement; consequently a guarantor of the rent under the original tenancy is not liable for rent which became due after the time when the notice would have expired.⁴ An agreement by the landlord, at the request of the tenant, to suspend the exercise of his rights under the notice to quit will not operate as a waiver of the notice, or as license to the tenant to be on the premises otherwise than subject to the landlord's right of acting on such notice if necessary.⁵

SEC. 45. By verbal disclaimer. What amounts to a disclaimer.—If a tenant from year to year, verbally or in writing, unequivocally denies the title of his landlord, and renounces his character of tenant, either by setting up title in another, or by claiming title in himself,⁶ the tenancy may be determined by the landlord, without any

¹ *Blight v. Bennet*, 13 C. B. 178.

² *Jenner v. Clegg*, 1 Moo. & Rob. 213, 215; *Gray v. Bompas*, 11 C. B., N. S. 520. See *Jones v. Shears*, A. d. & El. 832.

³ See *Doe v. Milward*, 3 M. & W. 328.

⁴ *Tayleur v. Wildin*, L. R. 3 Ex. 308, 305; *Blyth v. Dennett*, 13 C. B. 178.

⁵ *Whiteacre v. Symonds*, 10 East, 16.

⁶ Per *Tindal*, C. J., in *Doe v. Cooper*, 1 M. & Gr. 139. See *Jones v. Mills*, 10 C. B., N. S. 788; *Doe v. Cawdor*, 1 Cr., M. & R. 898; *Hunt v. Allgood*, 10 C. B., N. S. 253. While a tenant is in possession in subordination to the landlord's title he cannot deny the landlord's title, and the theory

upon which this doctrine rests is, that he is estopped, which the landlord reposes upon the security of the tenancy, believing the possession of the tenant to be his own, from denying that title. But, if, when the term is ended, the tenant distinctly disclaims holding under the landlord's title, and so notifies him, and the landlord permits him to remain in possession without any attempt to maintain his title to the premises until the statute of limitations has run, he cannot recover possession either from the tenant or the grantees, *Wilson v. Watkins*, 3 Pet. (U. S.) 50. The notice terminates the term and from that time the tenant is a wrong doer.

notice to quit.¹ It seems that whether a particular expression does or does not amount to a disclaimer, is a question for the decision of the jury.² An omission to acknowledge the landlord as such, by requesting further information, will not be enough; nor will a mere refusal to pay rent. A refusal to deliver possession, or a declaration by the tenant that he will continue to hold possession, cannot have that effect, at a time when the landlord has no right to claim it.³ A tenant cannot by disclaimer, or by mere words denying the landlord's title, and asserting title in himself, relieve himself from the tenancy, or in that manner open the way for the assertion of an adverse possession,⁴ as the possession of the tenant is the possession of the landlord and enures to his title and benefit⁵ and is presumed to continue in subordination to the landlord's title, not only during the term named in the lease, but also until twenty years after the term is ended, during which no rent has been paid or other act done recognizing the landlord's title. This presumption may be rebutted however, but to have the effect of putting the statute in operation, the tenant must surrender the possession to the landlord, or do some other act of an equally decisive character, and bring home to him knowledge of the adverse claim.⁶

A notice to quit is regarded as unnecessary in a case where the tenant denies the landlord's title, because in such a case he is treated as denying the tenancy.⁷ As to whether the tenant has done or said that which amounts

¹ Doe v. Whittick, Gow, 195; judgment in Doe v. Pasquali, Peake, N. P. C., 197; Doe v. Frowd, 4 Bing. 557; Doe v. Grubb, 10 B. & C. 816; Doe v. Rollings, 4 C. B. 188; Doe v. Thompson, 5 A. & A. 532; Doe v. Evans, 9 M. & W. 48; Doe v. Gower, 17 Q. B. 589; Bolton v. Landers, 27 Cal. 104; Tuttle v. Reynolds, 1 Vt. 80; Brown v. Keller, 32 Ill. 151; Jackson v. French, 3 Wend. (N. Y.) 337.

² See Doe v. Long, 9 C. & P. 773.

³ See judgment in Doe v. Stanion, 1 M. & W. 695; Jones v. Mill, ante.

⁴ DeLancey v. Ganong, 9 N. Y.

⁵ Jackson v. Davis, 5 Cow. (N. Y.) 129; Whiting v. Edmunds, 94 N. Y. 314; Sands v. Hughes, 53 id. 293.

⁶ Towne v. Butterfield, 97 Mass. 105; Thayer v. Society &c., 20 Penn. St. 62; Jackson v. Stiles, 1 Cow. N. Y. 575.

⁷ Calvert v. Frowd, 4 Bing. 560; Jeffrus v. Whittick, Gow, 195; Phillips v. Rollings, 4 C. B. 188. In such a case, by denying the landlord's title, the tenant is estopped from setting up a tenancy. Cole on Ejectment, 41.

to a disclaimer is a mixed question of law and fact. When the facts are admitted, it is purely a question of law, and the essential point is, whether what was said or done amounts to a denial of the existence of any tenancy between him and the landlord. If it does, no notice is necessary.¹ What was said or done, must amount to a renunciation of the tenancy, either by setting up title in himself, or claiming to hold under another.² The fact that the tenant did not intend to repudiate the tenancy, will not protect him, if such was the legal effect of what he said or did.³ Thus, in an English case,⁴ it was held that a refusal to pay rent to a person legally entitled thereto, unless such person proved his right to the rent, amounted to a disclaimer. But such would not be the case if a person claimed the reversion under a will which was being contested.⁵

¹ Jones v. Mills, ante; Lewis v. Cawdor, 1 C. M. & R. 398; Williams v. Pasqualli, Peake, 259; Hunt v. Allgood, 10 C. B. N. S. 203; Williams v. Cooper, 1 M. & G. 135; Tuttle v. Reynolds, 1 Vt. 80; Brown v. Keller, 32 Ill. 151; Bolton v. Landers, 27 Cal. 104; Bennett v. Long, 9 C. & P. 773.
² Gray v. Stanion, 1 M. & W. 695; Jones v. Mills, ante.

³ Curzon v. Evans, 6 M. & W. 295. But see Bennett v. Long, ante, where in a case where several

joined in leasing the land, and the rent was to be paid to an agent, and afterwards one of the lessors who was really the sole owner, demanded the rent, and the tenant refused to pay him, saying, "You are not my landlord," the court left it for the jury to say whether by this he intended to deny the tenancy, or simply that the rent was to be paid to the agent.

⁴ Calvert v. Frowd, 4 Bing. 557; Phillips v. Rollings, ante.

⁵ Id.

CHAPTER VI.

TENANCY FOR LESS THAN A YEAR.

SEC. 46. Weekly, Monthly, Quarterly, and Semi-Annual Tenancies.

SEC. 47. Letting and Hiring of Furnished Houses and Lodgings.

SEC. 47. Lodgings let for immoral purposes.

SEC. 49. Liabilities of hirers of furnished houses, apartments, &c.

SEC. 50. Letting for storage or deposit.

SEC. 51. Duration of term notice to quit, &c.

SECTION 46. Weekly, Monthly, Quarterly, and Semi-Annual Tenancies.—As we have seen from what has been stated in the preceding chapter, *if an annual rent is reserved*, the tenancy is from year to year, although there is a stipulation that only a quarter's notice for its determination shall be given, and the same is true though it is stipulated that any notice, as a day's, week's, or year's notice shall suffice, because such stipulations are not inconsistent with the nature of the tenancy; but if there is a stipulation for thirteen months' or two years' notice, the tenancy cannot be said to be from year to year, because the length of notice agreed upon is inconsistent with the tenancy, and the tenancy becomes one from two years to two years.¹

Where no definite time is agreed upon, and the rent is fixed at so much a week, month, quarter, or half year, the tenancy is weekly, monthly, quarterly or half yearly, according to the circumstances and the custom, if any, in the locality where the premises are located,¹ and in the absence of any stipulation to the contrary they may at

¹ *Wilkinson v. Hall*, 3 Bing. N. C. 508. In *Hilsendegen v. Scheich*, 55 Mich. 468, it was held that an agreement by a tenant from month

to month to pay rent in advance, is a mere personal covenant and not a condition precedent to the rights of possession.

least be terminated by a reasonable notice to quit. As to what *is* a reasonable notice, is to be ascertained from the custom of the place, if there is any, or if not, then by the circumstances of the case. It seems to be settled, however, that a notice of a week in the case of a weekly tenancy, or of a month in the case of a quarterly tenancy, are, in any event, unless otherwise provided in the contract of letting, sufficient.¹

¹ In *Huffell v. Armistead*, 7 C. & P. 56, this question arose under the following circumstances: The defendant hired furnished apartments in the plaintiff's house for a week at a certain sum, and continued to occupy them for three weeks without any new contract. He went into occupation about the middle of the day on Monday, and left on the Monday month, about the same time, without giving any notice to quit. The plaintiff claimed that he went into possession the Saturday before. Nothing was said about any notice to quit when the lodgings were taken. The plaintiff, a few days before the defendant left, addressed to him a letter, requesting him to give him a week's notice previous to his leaving. The defendant tendered the plaintiff four weeks' rent. The plaintiff claimed five weeks' rent. PARKE, B., instructed the jury as follows: "The only question is," said he, "whether the tenancy commenced on the Saturday or the Monday. If it commenced on the Monday, I think the defendant, who entered on that day, was at liberty to quit on the same day in another week. I cannot say a week has been exceeded by holding six days and two fractions of a day. Upon the question of a notice to quit, the law is clearly settled that a yearly tenancy cannot be determined without a half year's notice. But that rule cannot be applied to a weekly taking, for the effect of it would be to show that a half week's notice was necessary to put an end to such a tenancy. I am not aware that it has ever been decided that in the case of an ordinary monthly or weekly tenancy that a month's or week's notice must be given. A

tenant who enters upon a fresh week may be bound to continue until the expiration of that week, or to pay the week's rent, but this is a very different thing from giving a week's notice to quit." In *Parry v. Hazell*, 1 Esp. 94, the tenant took a house by the month, and he had a month's notice to quit, which the court held was sufficient. In *Peacock v. Ruffin*, 6 Esp. 4, an action of ejectment was brought for a shed in Covent Garden. A week's notice to quit had been given, but the defendant, having shown that the plaintiff agreed to give him four weeks' notice, he was non-suited, but LORD ELLENBOROUGH said, "A week's notice is certainly sufficient where the holding is weekly, but the rule of law as to the legality of notice is still controllable by the agreement of the parties." As to what is a sufficient proof of usage see *Wood v. Wood*, 1 C. & P. 59. There is no English case in which it has ever been held that a notice, in the case of short tenancies, must be given equal in length with the term, but it has been held that *some* notice must be given, *Jones v. Mills*, 10 C. B., N. S. 788, and the safest course to pursue is to give a week's notice in case of a weekly tenancy, &c. See opinion of WILLIAMS, J., in *Jones v. Mills*, ante. In Illinois, by statute, thirty days' notice is required, *Seem v. McLees*, 24 Ill. 192, and such also is the rule in Michigan, *Huyser v. Chase*, 18 Mich. 98, while in Massachusetts and in New York, it is held that no such notice is necessary, but simply reasonable notice. *Shorey v. Farrell*, 114 Mass. 441; *People v. Shacko*, 48 Barb. (N. Y.) 581; *Gibbons v. Day-ton*, 4 Hun. (N. Y. S. C.) 451.

SEC. 47. Letting and Hiring of Furnished Houses and Lodgings.—Contracts of letting and hiring furnished houses or apartments are of a mixed nature, partaking partly of the nature of a demise of lands, and partly of the letting and hiring of personal chattels, but in law the rent is deemed to issue out of the reality, and not in part from the furniture.¹ But, if a house is let as ready furnished, and it turns out to be only partially furnished, or if the landlord agrees to send in certain necessary furniture, and neglects to do it within a reasonable time, the agreement respecting the furniture being in a condition precedent to the payment of rent, the landlord must show performance of such condition before he can distrain for the rent,² and the agreement to supply the furniture being an inseparable part of the contract for an interest in land, will not furnish the basis of an action in favor of the tenant for its breach, unless in writing, as required by the Statute of Frauds.³

A different rule prevails as to the liability of a landlord, or rather as to the implied obligations between the letting of an unfurnished and a furnished house. In the former case, there is no implied contract or covenant that the house is tenantable,⁴ or fit for the purpose for which it was let,⁵ while in the latter the landlord is treated as impliedly holding it out and contracting that it is fit for immediate habitation and use by the tenant; and if *the furniture* is not fit for use, or if it is incumbered with a nuisance of such a character as practically to deprive the tenant of its beneficial use, the tenant may abandon the tenancy and recover damages of the landlord for the breach of his contract.⁶ In the case last referred to, a furnished house was let to the defendant by the plaintiff for five or six weeks. The defendant went into possession, but found the house and furniture so infested with bugs, as to in-

¹ Nunan v. Huderton, 2 B. & P. 224; Emmett's Case, Dyer 212 b.; Spencer's Case, 5 Coke 16; Cadogan v. Kennett, Camp. 432.

² Mechelen v. Wallace, 7 Ad. & El. 54 n.

³ Id.

⁴ Witty v. Matthews, 52 N. Y. 512; Sutton v. Temple, 12 M. & W. 52; Powell v. Lumley, 39 Cal. 151.

⁵ Sutton v. Temple, ante; Bussman v. Gauster, 72 Penn. St. 285.

⁶ Smith v. Marrable, 11 M. & W. 5.

terfere seriously with the comfortable enjoyment of the premises. The defendant complained to the landlord about the nuisance, and he sent a person to take means for the extermination of the vermin, but without success, and before the end of the first week the defendant moved out of the house and sent the key to the plaintiff, with a week's rent. In an action to recover for five weeks' rent, it was held that no recovery could be had. "A man who lets a ready furnished house," said LORD ABINGER, C. B., "surely does so under the implied condition or obligation that the house is in a fit state to be inhabited. Suppose," he added, "instead of the particular nuisance which existed in this case, the tenant discovered the fact (unknown perhaps to the landlord) that lodgers had previously quit- ted the house in consequence of having ascertained that a person had previously died in it of plague or scarlet fever, would not the law imply that he ought not to be com- pelled to stay in it?"¹

When rooms or apartments in a house or other build- ing are rented, the landlord impliedly demises all the necessary and proper accompaniments to their beneficial and comfortable enjoyment. Thus if a person take lodg- ings on the first and second floors of a house, he has a right to the use of the door bell, the knocker, the skylight of the staircase and the water closet, and every other con- venience connected with the building, essential to the comfortable enjoyment of the leased portion, unless it be otherwise stipulated at the time of the taking of the lodg- ings; therefore, if the landlord deprives the tenant of the use of either, an action lies against him therefor.²

¹ The doctrine of this case, so far as it relates to the case of ready furnished houses, was approved in *Sutton v. Temple*, 12 M. & W. 52, and *Hart v. Windsor*, 12 id. 68, but the *dicta* of the case as to unfur- nished houses was wholly repudi- ated.

² In *Underwood v. Burrows*, 7 C. & P. 26, the plaintiff rented two rooms of the defendant on the second floor, and at the time of the renting he pointed out a water closet on the first floor as the one

to be used with the lodgings. There was also a knocker and door bell on the door, a skylight to light the stairway, and a handrail along the stairs. Subsequently, the de- fendant took out the water closet, darkened the skylight, covered the handrail with tar, took the knock- er off the door, and on several cases the bell wire was cut. The plain- tiff brought an action on the case against the defendant for the in- jury. It did not appear that any- thing was said about the handrail,

The landlord letting rooms and apartments, and retaining the general possession of the house, is bound to exercise reasonable care for the protection of the persons and property of his tenants or lodgers, to see that the outer doors are properly locked at night, and that no suspicious or doubtful characters, unknown to the lodger, are allowed to congregate in the house at unseasonable hours of the night. So, too, he is bound to exercise ordinary care in the selection of servants within the house, and to take all reasonable care to provide against robbery and fire. But he is bound only to the exercise of such reasonable care as an ordinarily prudent housekeeper would exercise, and does not stand as an insurer against possible loss or injury from any of these causes; nor does he assume such liabilities as are imposed on an innkeeper; and after having exercised proper care in the selection of his servants, he is not responsible for the larceny of the tenant's goods in consequence of an outer door being accidentally, or even carelessly, left open by one of the servants,¹ nor is he responsible for property stolen from the tenant by another lodger, by a servant or a stranger, unless actual negligence on his part in reference to the admission of the lodger, or the hiring of the servant, is fully established.²

SEC. 48. Lodgings let for immoral purposes.—If rooms or buildings are *knowingly* let for immoral purposes, no recovery for their rent can be had, as in such a case the parties are treated as being *in pari delicto*.³ Thus, if a lodging-house keeper knowingly lets lodgings to a pros-

the skylight, the knocker or the bell, at the time the contract of renting. The defendant offered to show that nothing was said about these things, but LORD ABINGER, C. B., rejected the evidence, saying that they spoke for themselves. That is, they were there when the rooms were rented, and were accessories to the enjoyment of the rooms and the tenant had a right to have them remain, whether anything was said about them or not. The defendant insisted that

as nothing was said about the plaintiff having the use of knocker, &c., he had no right thereto. LORD ABINGER said "There would be a positive right for him to use it, *unless it were expressly excepted*." The plaintiff had a verdict for £50, which was sustained.

¹ Dansey v. Richardson, 3 El. & Bl. 144; Holder v. Souby, 8 C. B., N. S. 254.

² Smith v. White, L. R. 1 Eq. Cas. 626; Rawlston v. Brady, 20 Ga. 449.

titute to enable her to prosecute her vocation in consorting with men, no recovery can be had for the rent, ' or if, after having admitted her, he ascertains the fact that she is using her lodgings for that purpose, and permits her to remain. ' But, the mere fact that the woman is a prostitute, if she merely lodges there and receives her visitors elsewhere, does not prevent a recovery, and such is also the rule even though she receives and consorts with men at her lodgings, if the landlord does not know the fact. ' The same rule applies to lodgings or buildings *knowingly* let for *any* immoral or unlawful purpose. '

SEC. 49. *Liabilities of hirers of furnished houses, apartments, &c.*—Contracts for the hiring of furnished houses or apartments, being for an interest in or concerning lands under the Statute of Frauds, cannot be enforced unless in writing, or the hirer *actually enters into possession*, nor will any action lie for a breach of the contract. But if the tenant enters into possession he may be compelled to pay the rent in an action for use and occupation, and his goods may be distrained by the landlord. ' He is subject to the same rules of liability as to the use of the house and furniture as an ordinary hirer of realty, and of personal chattels for use. He is not responsible for ordinary wear and tear resulting from its reasonable use, but in other respects he is bound to deliver up the property clean, and in as good condition as he received it. If he receives linen, plate, crockery, and other household utensils clean and fit for use, and agreed to leave them as he found them, he is bound to return them to the lessor in that condition. ' But as to lodgers, where the landlord retains general possession, this rule does not prevail, and they are only responsible for wilful injury to the property, or such as resulting from their negligence.

SEC. 50. *Letting for storage or deposit.*—A person let-

¹ *Jennings v. Throgmorton*, Ry. & Moo. 251.

² *Giraudy v. Richardson*, 1 Esp. 18. *Jennings v. Throgmorton*, ante.

³ *Appleton v. Campbell*, 2 C. & P. 347.

⁴ *Smith v. White*, ante; *Bowry v. Bennett*, 1 Camp. 348.

⁵ *Newman v. Anderton*, 5 B. & P. 227.

⁶ *Stanley v. Aynur*, 12 M. & W. 827.

ting a room, vault, store or other place of deposit in a warehouse or other building, stands in a position analogous to that of a person who lets apartments for lodgings. By the civil law a man who lets out a store or place of deposit for corn, wine, oil or merchandise of a perishable nature, is treated as impliedly warranting his store-house to be fit for the purpose for which it was known to be required. If the hirer has inspected it, and approved it prior to the contract, the storekeeper is held not responsible for patent defects which the hirer might have ascertained by the exercise of ordinary vigilance, but for all latent defects causing injury to the goods he is responsible. He is bound to keep the roof tight, and if the goods are in a basement or cellar, to keep it properly drained and free from water, and if he remains in general possession of the building it is his duty to see that the outer gates, doors, and the windows are properly fastened at proper hours of the night, and that suspicious persons are not permitted upon the premises, or to lurk around the place, and, in a word, to keep a proper watch upon the building, and to take all proper precautions to secure the building from attacks without, and from dangers within, such as fire and damp and all other hurtful things to the property deposited there.¹ Contracts of this character must be largely construed in reference to the circumstances of each case, and the nature and character of the property, as well as the knowledge of the depositor of the condition of the premises.

SEC. 51. Duration of time, notice to quit, &c.—Lodgings and furnished apartments are rarely the subject of a yearly hiring, consequently there is no presumption from a general hiring, that it is a hiring for a year, as in the case of the hiring of unfurnished houses or of lands.² The duration of the tenancy is usually measured by the periods fixed for the payment of the rent, and is a weekly, semi-monthly, monthly, quarterly. or half-yearly tenancy, ac-

¹ Pandect ed. Poth. lib. 19, tit. 2, sec. 3, art. 3, 71.

² Wilson v. Abbott, 4 D. & R. 694.

according to the periods in which the rent is to be paid. If the rent is payable weekly, monthly or quarterly, it is regarded as a weekly, monthly or quarterly tenancy, and the same rule prevails whether the time for the payment of the rent is fixed at longer or shorter periods. By the French law,¹ if the tenancy is for a single week, month or quarter, no notice to quit is necessary, as the duration of the tenancy is fixed, and is determined at the expiration of such respective periods by the efflux of time, and such is the rule at the common law.² But by the French law, if the tenancy is from week to week, month to month, quarter to quarter, or from half year to half year, a notice to quit of the same duration as the tenancy must be given, and if the lodger quits without giving such notice, he is liable for the rent for the whole term which he had entered upon. By the common law, as we have seen,³ no such rule prevails, and no more than reasonable notice is required. If, however, there is a custom or usage in this respect, or if the tenant has failed to give a reasonable notice of his intention to quit, or to comply with an usage in that respect, or if he has commenced a new week, month or quarter, he remains liable to the landlord for the rent for the balance of such week, month or quarter, even though the landlord has posted a notice of "To Let" in the windows of the room, or has lighted or used fires therein.⁴

¹ POTHIER's Louage, No. 30.

² Mosher v. Riding, 12 Me. 478; Hamitt v. Lawrence, 2 A. K. Mar. (Ky.) 366; Logan v. Herron, 8 S. & R. (Penn.) 459; Donnell v. Johnson, 17 Pick. (Mass.) 263; Allen v.

Jaquish, 21 Wend. (N. Y.) 628.

³ See ante, p. 90.

⁴ Griffith v. Hodges, 1 C. & P. 419; Redpath v. Roberts, 3 Esp. 225.

CHAPTER VII.

TENANCY FOR LIFE.

SEC. 52. How created—qualities of.

SEC. 53. Rights of tenant for life.

SEC. 54. Liabilities of life tenant.

SEC. 52. How created—qualities of.—An estate or tenancy for life may be created by deed, demise or devise, and either with or without rent. This species of estate or tenancy differs in many essential respects from a lease for years, the principal of which is, that it confers a freehold upon the tenant, while a lease for years is a mere chattel interest, although there are other marked distinctions. It cannot be created by parol,¹ nor, except by an instrument operating under the statute of uses, can it at the common law be made to commence *in future*, because of the fact that it must be accompanied with, or perfected by, livery of seizin.² In contemplation of law, it is equal to a seven years' purchase of the fee,³ and may be set off on execution as real estate.⁴ Without words of inheritance, it cannot be enlarged into a fee, either by a warranty in fee, or by a covenant for quiet enjoyment to the grantee and his heirs,⁵ nor by reference to a will which creates a fee without words of inheritance.⁶ In all cases where there are no words

¹ Stewart v. Clark, 13 Met. (Mass.) 79; 8 East 166; Garrett v. Clark, 5 Oregon, 464.

² Platt on Leases, 678; Webster v. Gilman, 1 Story (U. S.) 499; Barwick's Case, 5 Coke, 93 b; Bucklin's Case, 2 Coke, 55 b; 2 Blackstone's Com. 144, 314; Shep. Touch 272.

³ Garland v. Crow, 2 Bailey (S. C.), 24.

⁴ Wheeler v. Gorham, 2 Root (Conn.) 328.

⁵ Roberts v. Forsythe, 8 Dev. (N. C.) L. 26.

⁶ Lytle v. Lvtile, 10 Watt. (Penn.) 259.

of inheritance in the instrument conveying the estate, a life interest only is created, and the grantee becomes merely a tenant for life.¹ Thus, a deed to A, "his executors, administrators, and assigns," omitting the word "*heirs*," conveys simply a life estate.² So a conveyance to "A and his generation, to endure as long as the waters of the Delaware shall run," conveys only a life interest;³ and an instrument conveying an interest in real estate "so long as he may desire to use it as a drug store," confers a life estate,⁴ there being no limitation in point of time, it becomes, *ab initio*, a grant of an estate for life as though no such event had been in contemplation. The intention of the parties from the words used in the deed or lease, must control, and parol evidence is never admissible to change it, nor in the absence of words of inheritance will a conveyance be construed as conveying a longer estate than for life, unless the words used are such as to conclusively show that the intention was to create a fee.⁵ The intention of the grantor or lessor, both as to the estate conveyed and the life upon which it is dependent, must be collected from the instrument itself, and will control. Thus, where A demises to B for the term of *his* natural life, the demise is *prima facie* for the life of B; but where A demised to B, his executors and administrators, for the term of his natural life, and the lease contained a covenant by A for the quiet enjoyment of the premises by B, his executors, &c., during the natural life of A, it was held that the word "*his*," in the demising clause, must be referred to A, the grantor, and not to B, though his name was the last antecedent.⁶

¹ Hall v. Goodwin, 2 N. & Mc Cord (S. C.) 383.

² Clearwater v. Rose, 1 Blackf. (Ind.) 137.

³ Foster v. Joice, 3 Wash. (Va.) 408.

⁴ Thomas v. Thomas, 17 N. J. L. 356. A grant to B of the manor of Dale, conveys simply a life estate (Co. Litt. 42 a, 183 a), because there are no words of inheritance; but, where an intention to convey

the fee can be collected from the terms of the deed, it will be so construed. Pritchard v. Dodd, 5 B. & Ad. 689.

⁵ Pritchard v. Dodd, ante.

⁶ Pritchard v. Dodd, ante. In this case, PATTISON, J., said, "The word 'his' in the demising clause is ambiguous; but then comes the covenant, that Adams shall quietly enjoy during Pritchard's life, which alone would satisfy me that

But where the lease does not mention for whose life and there are no words of explanation or qualification, the *lessee's* life will be intended, on the principle that the grant must be construed most strongly against the lessor.¹

"A lease for life or lives may be granted to one person, or to several, and where to several, the term may be made to endure for their joint lives, or for the lives or life of the survivors and survivor; or the lessees may be made to take beneficially in succession; or the estate may be held for the life or lives of a stranger or strangers alone, or as joint *cestui que vie* with the lessee or lessees. In fact the modifications of holding are almost endless."²

Where it is intended that a lease to two or more persons shall determine on the death of either, the grant should be for their joint lives, but if the interest is to continue with the survivor, it is sufficient to grant it to them generally for their lives without inserting words of survivorship, which however are harmless;³ and on the death of one the entire estate will survive to the other.⁴ But if a lease be granted for a certain term, as for one hundred years, "if A and B shall so long live," the estate is determined upon the death of either;⁵ so if it be made "so long as C and D shall remain Justices of the Peace, upon the failure of either of them to continue justices, the estate is determined." The estate cannot be made dependent upon the life of a person not then born, but, if it be made to A during the natural lives of C and D *and of E's granddaughter*, not then born, it will be good during the lives of C and D only, although a granddaughter to E is subsequently born.⁶

Where an estate is demised to *two* persons so long as either of them shall live, if the tenants partition the estate, each taking a moiety thereof, upon the death of one his moiety reverts to the lessor, as the partition

a lease for Pritchard's life was contemplated in the demising clause. The whole demising clause taken together, suggests that construction."

¹ *Smith v. Jersey*, 7 Price, 453; Co. Litt. 42 a.

² Platt on Leases, 679.

³ Co. Litt. 63 b.

⁴ *Crudwell's Case*, 5 Coke, 9 a.

⁵ *Brudwell's Case*, ante.

⁶ *Ibid.*

⁷ *Pemberton v. Edwards*, 1 M. & W. 553.

defeats the survivorship;¹ but the rule is otherwise where the lease is for years, with a proviso determining the lease upon the death of both within the term. In that case, if partition is made, and one of the tenants dies, his share goes to his executors or administrators during the life of the other tenant.² Estates for life may be made dependent upon future contingencies before the life for which they are granted expires. As a lease to a woman so long as she remains sole, or to a husband and wife during coverture, or to a person so long as he inhabits, or pays a certain rent,³ or until he has received a certain sum out of the profits of the estate, or until he receives a certain position,⁴ or so long as he desires to use it for a certain purpose,⁵ and the reason is, that the duration of the estate depends upon the condition,⁶ and the estate is as perfect an estate for life until the event upon which it is conditioned happens, as though it had been granted absolutely.⁷ The husband does not take an estate by curtesy out of lands held by his wife for life.⁸

SEC. 53. Rights of tenant for life.—A tenant for life, whether under a deed, lease, or devise, takes a freehold estate and may convey his interest therein either by deed or lease in any way not injurious to the remainder.⁹ He

¹ Litt. sec. 331; Co. Litt. 204 b; 1 Jones 185; *Borough's Case*, 4 Coke, 73 b.

² In *Farrington's Case*, 1 Dyer 67 a, pl. 18, a lease for years was made to two with a proviso "that if the said lessees die within the term, it shall cease," the lessees make partition, where one alienates his part and dies, the lessor cannot enter into his part who is dead, but the grantee or the executors of the lessee (if he do not alien) shall have his part during the life of the survivor; and no occupancy shall be in such a case, and it is not as where a lease is made to two "for the term of their lives," and they make partition, and one die, his part shall revert to the lessor.

³ In *Mickie v. Wood*, 5 Rand (Va.)

574, the defendant's intestate devised to the plaintiff, his land and his negroes so long as the plaintiff should pay him £100 per annum during his (the defendant's) life. The court held that the lease was substantially for the life of the defendant. See also *Maverick v. Gibbs*, 8 McCord (S. C.) 211; *Newton v. Wilson, H. & M. (Va.)* 470.

⁴ Co. Litt. 42 a; *Roseboom v. Van Vetchen*, 5 Den. (N. Y.) 414.

⁵ *Thomas v. Thomas*, 17 N. J. L. 356.

⁶ Co. Litt. 42 a.

⁷ Co. Litt. 42 a; *Thomas v. Thomas*, ante. *Wilmarth v. Bridges*, 113 Mass. 407.

⁸ *Hatfield v. Sohler*, 114, Mass. 48; *Robins v. Quinlinen*, 79 Penn. St. 333.

⁹ *McC Campbell v. McC Campbell*, 5

is entitled to the beneficial enjoyment of the estate, and may work out any *open* mines or quarries upon the land without being chargeable for waste,¹ but he cannot open new mines or quarries, nor dig clay to manufacture into brick, or in fact do any act not usually incident to such estates, that injuriously affects the reversion,² nor can he cut and sell wood or timber growing upon the estate, even though the avails are to be expended in repairs or improvements upon the lands,³ or to pay the expense of cutting and hauling wood to which the tenant is entitled,⁴ nor can he cut fire-wood except for the use of the principal dwelling upon the land, not even for the use of a farm laborer who lives upon the land, nor even though the farm is large and the services of laborers are indispensable.⁵

But he may sue and recover damages done to the estate interfering with his enjoyment thereof, even though the reversion is also affected thereby.⁶ He has an insurable

Litt. (Ky.) 92; King v. Sharp, 6 Humph. (Tenn.) 55; Price v. Price, 28 Ala. 609.

¹ Lynn's Appeal, 31 Penn. St. 44; Irwin v. Cavode, 24 id. 162; so he is entitled to work an open sand pit. Reed v. Reed, 16 N. J. Eq. 248; and if a lease of land and mines is made, and some are open and some not, only the open mines pass. Astry v. Ballard, 2 Lev. 185; Whitfield v. Benit, 2 P. Wms. 242; Lord Davey v. Askwith, Hob. 334; but new shafts or pits may be opened for the purpose of working the old mines. Clavering v. Clavering, 2 P. Wms. 888. In Saunder's Case, 5 Coke, 12 a, the rule as now held was advanced. In that case it was resolved that if a lease of land be made for life, or for years, in part of which there is an open mine, the lessee may work it, and that he could not open a new mine; but that, if the land and all mines were leased, the lessee might dig for them, but that mere lease of the land conferred no authority to work new mines, and that if the lessee did open new mines, he was guilty of waste. So a tenant for years, may work an open mine upon the premises

unless restricted by his lease, but he cannot open a new mine unless the right is expressly conferred in the lease.

Warlow v. Lake Superior Iron Co. 36 Mich. 105.

² Livingston v. Reynolds, 2 Hill (N. Y.) 157. In Westmoreland Coal Company's Appeal, 4 W. N. Cas. (Penn.) A died, seized of two tracts of land, separated by an intervening tract. Upon one of them a coal mine had been opened in A's lifetime. A's widow, who was a tenant for life under A's will, leased both the tracts to the Westmoreland Coal Company, who owned the intervening tract. The coal company, pursued underground a vein of coal from the open mine on one tract, through their intervening tract and within the boundary of the other tract. It was held that the taking of coal from the second tract constituted waste.

³ Elliott v. Smith, 2 N. H. 490.

⁴ Johnson v. Johnson, 18 N. H. 594; Miles v. Miles, 32 id. 147.

⁵ Sarles v. Sarles, 3 Sandf. (N. Y.) Ch. 601.

⁶ Railroad v. Boyer, 13 Penn. St. 497.

interest in the buildings, and may insure such interest in his own name,¹ but in such cases he is bound to apply the money to the repair or rebuilding of the buildings injured or destroyed, and a court of equity will compel such application of it upon bill brought by the remainderman.² If the estate consists of stock and lands, he is entitled to all the increase of the stock, and the crops growing upon the land at his death,³ and if he has underlet the premises, his tenant is entitled to harvest all crops sown before the principal tenant's death.⁴ If he makes permanent improvements upon the land, they inure to the benefit of the estate, and by the common law the remainderman cannot be charged therefor, or compelled to contribute thereto.⁵

SEC. 54. **Liabilities of Life Tenant.**—In the absence of any reservation of rent, or other provision in the lease or conveyance providing therefor, a tenant for life as between himself and the reversioner is bound to pay the taxes assessed upon the premises, and if he fails to do so, and they are sold therefor, and the tenant becomes the purchaser, he cannot claim a title in fee against the reversioner,⁶ and it seems that if the interest of the reversioner is sold upon a judgment against him, upon a debt which is a legal charge upon the reversioner and an equitable charge upon the life estate, and the tenant buys the reversioner's interest, he will, in equity, be treated as buying for the benefit of the reversioner as well as his own;⁷ and so generally, any incumbrance

¹ *Fireman's Ins. Co. v. Drake*, 2 B. Mon. (Ky.) 47; *Curry v. Com. Ins. Co.*, 10 Pick. (Mass.) 535; *Harris v. York M. Ins. Co.*, 50 Penn. St. 341; *Kearney v. Kearney*, 17 N. J. Eq. 59.

² *Brough v. Higgins*, 2 Gratt. (Va.) 408.

³ *Poindexter v. Blackham*, 1 Ired. (N. C.) Eq. 286; *Saunders v. Houghton*, 8 id. 217; *Hunt v. Watkins*, 1 Humph. (Tenn.) 498.

⁴ *Evans v. Briscoe*, 4 H. & J. (Md.) 139.

⁵ *Thurston v. Dickenson*, 2 Rich. (S. C.) Eq. 317; *Austin v. Stevens*, 24 Me. 52.

⁶ *Patrick v. Sherwood*, 4 Blatchf. (U. S. C. C.) 112; *McDonald v. Heylin*, 4 Phila. (Penn.) 73; *Cairns v. Chobert*, 8 Edw. Ch. (N. Y.) 812; *Fleet v. Dowland*, 11 How. Pr. (N. Y.) 489. Upon a rent reserved whether nominal or otherwise a tenant for life is equally bound with a life tenant having a freehold estate to keep down taxes, pay interest on incumbrances and make necessary repairs, *Carter v. Youngs*, 42 N. Y. Superior Ct. 418.

⁷ *Davies v. Myers*, 13 B. Mon. (Ky.) 511.

upon the estate removed by him is held to be for the *joint* benefit of himself and the remainderman.' He is bound in equity to keep down the interest upon any mortgage upon the property,¹ but he is not bound to pay any part of the principal, and if he purchases the mortgage debt it inures to his own benefit.² He is bound to make such repairs as are necessary to prevent waste, but is not bound to a higher duty in this respect.³ The tenant will not be permitted to commit waste nor seriously impair the value of the reversion. He may use the property as he pleases, except that he must do nothing to interfere with the interests of the reversioner, or to impair the value of his estate, and if he threatens or attempts to do so equity will enjoin him.⁴ The liability of a tenant for life under a demise, may be different, and controlled entirely by the contract, especially where an annual rent is reserved, and the lease itself attempts to regulate the respective relations and liabilities of the parties, and in all cases the instrument under which the estate is created must be consulted to ascertain the exact position of the tenant to the remainderman, as the ordinary rights of a tenant for life may be limited or enlarged thereby.

¹ Foster v. Hilliard, 1 Story (U. S.) 77.

² Mosley v. Marshall, 27 Barb. (N. Y.) 42.

³ Barnum v. Barnum, 42 Md. 251.

⁴ Kearney v. Kearney, 17 N. J.

Eq. 504; Wilson v. Edmonds, 24 N. H. 517. Matter of State, 19 N. J. Eq. 504.

⁵ Langworthy v. Chadwick, 13 Conn. 42. *Cheshire v. Cheshire*, 2 Ired. (N. C.) Eq. 569.

CHAPTER VIII.

ESTATES FOR YEARS.

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SECTION 55. What are.—An estate for years is a contract for the possession of lands or tenements for some

determinate period ; and it takes place when a man lets them to another for the term of a certain number of years agreed upon between the lessor and the lessee, *and the lessee enters thereon*. If the lease be but for half a year, or a quarter, or any less time, the lessee is regarded as a tenant for years, and is styled so in some legal proceedings ; a year being the shortest term of which the law in this case takes notice.

SEC. 56. *A year, what ?* — A year is 365 days, for though a leap year has 366 days, yet by the 21 H. 3, s. 1, the increasing and preceding day are reckoned as one.

SEC. 57. *A month in law, lunar. With four exceptions.* — A month is more ambiguous, being either lunar, consisting of twenty-eight days ; thirteen of which make a year ; or calendar, of which there are twelve in a year. A *month* in law is a lunar month ; therefore a lease for twelve months is only for forty-eight weeks ; but if it be for a twelvemonth, it is good for the whole year. In all statutes a month signifies a lunar month, unless it appears to be clearly intended to be a calendar month ; and in all legal documents and proceedings, the legal month is a lunar month, except in bills of exchange and promissory notes, cases of lapse, and *quare impedit*, in which four cases, months are deemed calendar months.¹

SEC. 58. *Origin of estates for years.* — These estates were originally granted to mere farmers or husbandmen, who rendered every year some equivalent in money, provisions, or other rent, to the lessors or landlords ; but in order to encourage them to manure and cultivate the ground, they had a permanent interest granted them, not determinable at the will of the lord. Their possession, however, was esteemed of so little consequence, that they were rather considered as the bailiffs or ser-

¹ From the cases in 3 Wils. 21 and 1 T. R. 159, it appears that a *notice* to a tenant from year to year to quit the premises, must be *half a year*, and not *six calendar months*, though the computation by the lat-

ter would be more simple and convenient ; and that is understood to be the proper notice by the Court of Common Pleas in 2 Bl. 1224 ; 6 Co. 61.

vants of the lord, who were to receive and account for the profits at a settled price, than as having any property of their own; they were, therefore, not allowed to have a freehold estate, but their interest, such as it was, vested after their deaths in their executors, who were to make up the accounts of their testator with the lord, and his other creditors, and were entitled to the stock upon the farm. The lessee's estate might also, by the ancient law, be at any time defeated by a common recovery suffered by the tenant of the freehold; which annihilated all leases for years then subsisting, unless afterwards renewed by the recoverer, whose title was supposed to be superior to his by whom those leases were granted.

By the 33 H. 8, c. 11, Ir., however, the termor (that is, he who is entitled to the term for years), being protected against these fictitious recoveries, and his interest rendered secure and permanent, long terms began to be more frequent than before; and were afterwards extensively introduced, being found extremely convenient for family settlements and mortgages.

SEC. 59. *Only chattels.*—But though at this day terms are much longer in their duration than formerly, and there is ample remedy to recover the term itself, yet the succession continues the same. All leases for years are held by law to be of less value, perhaps it would be more proper to say of less dignity, than estates for life, estates for life being freeholds, and for years but chattels, and regarded as part of the personal estate, and cast upon the executor. An estate even for the life of another is a freehold, but an estate for one thousand years is only a chattel.

SEC. 60. *The term, what?*—Every estate which must expire at a fixed period, by whatever words created, is an *estate for years*; and, therefore, commonly called a term.

SEC. 61. *The lease.* Gives a right of entry. And the entry gives the term.—“If a man grants a lease to another for

so many years as A shall name, it is a good lease for years, for the maxim *id certum est, quod certum reddi potest* applies. If no day of commencement is named, it begins from the delivery of the lease. A lease for so many years as A shall live, is void from the beginning, for it can never be reduced to a certainty, but a lease for twenty years, if A shall live so long, is good. A lease for years may commence *in futuro*, though a lease for life cannot; if A grants lands to B to hold from April next, for twenty years, it is good, but to hold from April next, for his life, was formerly treated as bad. For livery cannot be given *now*, of an estate to commence *in futuro*. But livery is not necessary to a lease for years; therefore such lessee is not said to be seized; nor does the lease give him any more than the right of entry, which right is called his interest in the term; but when he enters, and not before, he is possessed, not of the land, but of a term of years; the possession or seizin still remaining in him who has the freehold. The term does not merely signify the time specified in the lease; it means that and more; it means the *time* in the lease, and the *interest* conveyed by the lease, and the *estate* vested in the lessee by the possession. In fact the word *term* means the estate, and the word *termor* its owner.

SEC. 62. **Term may expire before the time.**—The term may expire before the time. If a lease is granted to A for the term of three years, and after the expiration of said term to B for six years, and A surrenders or forfeits his lease at the end of one year, B's interest immediately takes effect; but if the remainder had been to B after the expiration of the said three years, or from and after the expiration of said time, in such case B's interest would not commence until the time had fully elapsed.¹

SEC. 63. **The lease gives no possession.**—The lease gives no possession; it only gives a right of possession; therefore until entry is made by the lessee, no possession is vested in him by his lease, and therefore he cannot bring

¹Co. Litt. 45.

an action of trespass before entry. A man makes a lease to J. S., to commence at the feast of Saint Michael; lessee may grant, but he cannot have an action of trespass before entry.¹

SEC. 64. *Lease for years a contract for possession in consideration of rent.*—Mr. Finlay, in his excellent treatise upon the law of Landlord and Tenant, p. 336, thus defines a lease for years: “A lease for years then is a contract between the lessor and lessee for the possession and profits of lands or tenements, &c., on the one side, and a recompense for rent, or other income, on the other. More particularly: a lease is a species of conveyance, and properly signifies a demise, or letting of lands or tenements, rent, common, or any hereditament, whether corporeal or incorporeal, unto another, for a lesser time than he that lets it has in it; for if it be for the whole interest, it is more properly an assignment than a lease.”

The relation of landlord and tenant may be created by assignment or lease.

SEC. 65. *Lease or under lease.*—When the alienor conveys his whole estate to the the alienee, leaving no reversion in himself, the conveyance amounts to an *assignment*. When he grants only a portion of his estate, reserving to himself a reversion, the conveyance is a *lease*. When a lessee for years dispossesses himself of his term, reserving a reversion, however small, as only one day, the transfer is called, with reference to the original lease, an *under-lease*.²

¹ *Browning v. Beston*, Plow. 142; *Smith v. Mills*, 1 T. R. 480.

² *Blenco v. Bugby*, 3 Wils. 234.

Where a lessee of a lot of land makes a lease for the remainder of his term, of a building standing on a portion of the leasehold premises, and by the terms of the lease grants easements, appurtenant to the building, of light and air, and of passing and repassing over other portions of the leasehold premises, in common with him and those claiming under him, such lease is

an underlease, and not an assignment of his whole term in a portion of the leasehold premises. *McNeil v. Kendall*, 128 Mass. 245; 35 Am. Rep. 373.

The fact standing alone that the assignor of a lease continued in possession of the premises after the alleged assignment does not establish that the same was fraudulent, nor render him liable for rent thereafter accruing. *Tate v. McCormick*, 23 Hun. (N. Y.) 218.

If a termor for years make a lease for a period exceeding his term, it will operate as an assignment; as if a lessee for three years demise the premises for four years, he will not thereby gain any tortious reversion; but the demise will amount to an assignment.¹

But if a lessee *for lives* grants *all his estate and interest* to A *and his* executors, this will not be an assignment; because a grant to a man and his executors cannot convey a freehold.²

The distinction between an assignment and a lease depends solely upon the quantity of interest which passes, and not upon the extent of the premises transferred. Where, therefore, the lessee of a house for seven years demises *part* of it to another for the whole of his term, this is not an under-lease, but an assignment *pro tanto*; and so, on the other hand, when the lessee of a house for seven years demises the *whole* of the house for seven years *all but one day*, this is an under lease and not an assignment.³

An assignment, therefore, creates no new estate; but transfers an existing estate into new hands. a lease, or under-lease, creates a perfectly new estate.

SEC. 66. **Concurrent lease. Lease in reversion.**—When a lease is made to commence before the expiration of a subsisting lease, it is called a *concurrent* lease; when made to commence after the determination of another lease, it is a lease in reversion.⁴

SEC. 67. **The distinction of livery and grant simplified.**—There are two main divisions, corporeal and incorporeal—of things substantial, as land; or non-substantial, as rent or tithe; that is, of things lying as the law calls it in livery or in grant. The first being tangible, was by the common law alienated by livery of seizin; that is, by word of mouth before witnesses; and from its tangible and visible nature it admitted of such manner of transfer;

¹ Hicks v. Downing, Ld. Raym.

99.

² Derby v. Taylor, 1 East, 502.

³ Crusoe v. Bugby, Ab. Sup.

⁴ Winter v. Loveday, Com. 39.

but as to things lying in grant, these, from their abstract nature, were not in facts transferable; and a deed was always necessary for their alienation, the delivery of which passed the property, and the operative words of which deed were *dedi et concessi*, "I have given and granted." Therefore land at common law might pass by word of mouth, and livery of seizin, which was a gift by parol before witnesses, was the usual means of passing the freehold, except where it passed by matter of record, or under the statute of uses, or by surrender, release, or confirmation, in which cases the livery was unnecessary. But leases for years required no livery; they were, and still are, considered mere chattel interests, arising from the contract between the parties, and passing only an interest in the land, and not the freehold.

Leases for years, or assignments thereof, might, therefore, by the common law, have been made by deed or parol. To remedy the evils arising from parol demises, the Statute of Frauds was enacted.

SEC. 68. *Leases must be by deed and assignment in writing.*—All leases for lives or for a longer period than three years, and all assignments and surrenders, must be by deed, or by note in writing signed by the parties or their authorized agents.¹ When the term to be created does not exceed three years, and the rent amounts to two-thirds of the annual value, a parol demise is still sufficient. But though the statute does not require that an assignment should be *by deed*, it absolutely requires that in all cases it should be *in writing*; and therefore where a parol assignment was made of a lease from year to year which had been granted by parol, it was held to be void under the statute.²

SEC. 69. *And leases by the State, corporations, and husband and wife, must be by deed.*—It is to be observed, that the State cannot demise by parol for any term, however short; for it can only grant leases by patent under the

¹ Shep. Touch. 210.

² Warner v. Browne, 8 East, 167.

seal of the State.¹ And in like manner a corporation aggregate can only make leases under the corporate seal.* And it has been always held necessary, that a lease by husband and wife, of the wife's lands should be *by deed*, or it will be absolutely void, and cannot be confirmed by the wife after her husband's death; because her assent is necessary, *ab initio*, and that assent ought to be *by deed*.*

SEC. 70. *A deed, what?*—A deed *factum* is a written instrument comprehending a contract betwixt party and party. There are many kinds of deeds, but for the purposes of this treatise, it is only necessary to notice the four following: first, a feoffment; secondly, a gift; thirdly, a grant; fourthly, a lease.

SEC. 71. *Feoffment, gift, grant, lease.*—A feoffment is a gift of any corporeal hereditament to another in fee. A gift or donatian is applied to the creation of an estate in tail, as feoffment is to that of an estate in fee: and lease to that of an estate for life or years; it differs in nothing from a feoffment, but in the nature of the estate passing by it. A grant is the instrument of transferring the property of incorporeal hereditaments, or such things whereof no livery, that is *de-livery*, can be had, from their unsubstantial and abstract nature, and for this reason all corporeal hereditaments are said to lie in livery, and all incorporeal to lie in grant: in the first case the property is transferred by the livery, that is the *de-livery*, of the land; in the last case, the property is transferred and always was, by the delivery of the deed. A lease is properly a conveyance of any lands or tenements, in consideration of rent or other annual recompense made for life, for years, or at will, but always for a less time than the lessor has in the premises.

SEC. 72. *The components of a lease.*—Regularly these things must concur in the making of every lease. 1. There must be a lessor, and he must be a person able, and

¹ Botting v. Martin, 1 Camp. 330.

² Lane's Case, 2 Coke, 17.

³ Patrick v. Balls, Carth. 390;

Turney v. Sturgess, Dy. 91; Wal-
sal v. Heath, Cro. El. 656.

not restrained, to make the lease. 2. There must be a lessee, and he must be capable of taking the thing demised, and not disabled to receive it. 3. There must be a thing demised, and such a thing as is demisable. 4. If the thing demised is not grantable without a deed, or the party demising is not able to grant without a deed, the lease must be made by deed; and if so, then there must be a sufficient description and setting forth of the person of the lessor, lessee, and the thing leased; and all necessary circumstances, as sealing, delivery, &c., required in other grants, must be observed. 5. If it is a lease for years, it must have a certain commencement, at least when it comes to take effect in interest or possession, and a certain determination, either by an express enumeration of years or by reference to a certainty that is expressed, or by reducing it to a certainty upon some contingent, precedent by matter *ex post facto*, and then the contingent must happen before the death of the lessor or lessee. 6. There must be all needful ceremonies, as livery of seizin, attornment, and the like, in all cases, where they are requisite. 7. There must be an acceptance of the thing demised and of the estate, by the lessee. But whether any part is reserved upon a lease for life, years, or at will, or not, is immaterial; except only in the cases of leases made by tenant in tail, husband and wife, and ecclesiastical persons.¹

SEC. 73. **Qualities of this species of tenancies.**—A lease for a term of years, whether for a long or short period, confers only a chattel interest.² Formerly, the tenant was regarded as the servant or bailiff of the lord, and accountable to him for the profits of the land, and had no direct property in the land,³ but gradually his legal position was changed, and, instead of being treated as a ser-

¹ Wood. Con. 683.

² Shep. Touch. 273; 1 Platt on Leases, 2; Hazard Powder Co. v. Loomis, 2 Dis. (Ohio) 544. A lease for 99 years, renewable forever, conveys only a chattel interest. McLean v. Rockey, 3 McLean U. S.) 255.

³ 4 Bacon's Abr. tit. Leases (A.); 1 Gilbert on Tenures, 30; Case of the Queensbury Lease, 1 Bligh, P. C. 458; 2 Blackstone's Com. 141.

vant or bailiff of the lord, and bound to account for the profits of the land, he acquired a definite or limited interest therein, for which he rendered a specific rent, generally consisting of grain, provisions and other products of the lands. This species of estate "has always retained the bound of its original inferiority," says Mr. PLATT,¹ but, he adds, "time, and a more just appreciation of his position in the community have concurred in levelling many of the distinctions formerly existing between him and the freeholder."

Formerly, leases for a long time, as for more than forty years, were held to be void,² but at the present day no restraint is imposed upon their duration,³ and leases for 99 and 999 years are of common occurrence, and in some instances we find leases for ten thousand years.⁴ A lease from hour to hour, or from month to month, or from year to year, during forty years, is a good lease for forty years,⁵ and a lease for "a year, and so from year to year, until six years expire," is a lease for six years certain, and so is a lease for "a year, and so from year to year, as long as both parties agree, till six years expire," but, in the latter case the lease is for six years, with power on the part of either party to determine it at the end of any year.⁶

SEC. 74. *How created.*—This species of tenancy is always created by express contract, and, as previously stated, no limit is imposed by law as to the number of years for which leases may be made. The lease, however, must be certain *in its commencement, in its continuance, and in its termination*, and if it fails in either of these respects it lacks certainty, and is not a good lease for a term.⁷ Such leases, however, may be made to commence

¹ 1 Platt on Leases, 5.

² Co. Litt. 45 b; 1 Vent. 58; Risden v. Tuffin, Toth. 187.

³ Browne v. Tighe, 8 Bli. P. C., N. S. 272.

⁴ Cadwallder v. App., 81 Penn. St. 78.

⁵ Plowden, 273, 522.

⁶ Dod v. Monyer, 6 Mod. 215.

⁷ Plowden's Com. 272. In New York agricultural leases for more than twelve years, in which any rent or service of any kind is reserved, are declared invalid by the Constitution. Art. 1, Sec. 14, Constitution of New York.

in presente, or from a past or a future day,¹ or may be made to depend upon a contingency, provided a definite term of a certain number of years is fixed upon for which the lease is to continue in force, unless such contingency happens. Thus a lease for twenty one years, if A shall live so long, is a good lease for twenty-one years if A lives, or as long as A lives if he dies within the term.² So a lease for twenty years if the coverture between certain persons shall continue,³ or for twenty-one years if the tenant shall continue to occupy,⁴ or if the lessee shall pay a certain rent, or furnish food, lodging and clothing for a certain person. In all these cases, as well as in all cases where the duration of the term is fixed, but is dependent upon a condition or a contingency, it is a good lease for the whole term if the condition is complied with, or if the contingency does not occur, but if the condition is not complied with, or if the contingency does occur, the term is ended.⁵

SEC. 79. **May be determinable at option of either party.**—So a lease for years may be made determinable at specified periods at the option of either party thereto,⁶ but if any condition is imposed as a condition precedent to the exercise of such option, it must be complied with. Thus, where a lease of a mine was made for forty years, but with a provision that the lessee might put an end to the lease at any time within the first eight years, “and of such desire, should give the lessors notice in writing eighteen calendar months before the expiration of said eighth year, then, *all arrears of rent being paid, and all and singular the covenants and agreements on the part of the lessee having been performed*, the lease at the expiration of the eighth year should be void,” it was held that, all the conditions must be complied with as a condition precedent to the exercise of this option by the lessee, in-

¹ Enyes v. Donnithorne, 2 Burr. 1190.

² Lockwood v. Clarke, 8 East, 187, opinion of LAWRENCE, J.

³ 4 Bac. Abr. tit. Leases (L.), 3 p. 177.

⁴ Lockwood v. Clarke, 8 East 185.

⁵ Doe v. Carter, 8 T. R. 57; Doe v. Hawke, 2 East, 481; Lockwood v. Clarke, ante.

⁶ Friar v. Gray, 5 Exchq. 584; Bolton v. Lingham, 1 Starkie, 39.

cluding the payment of all arrears of rent.¹ So where the lease provides that either party may terminate the term at the end of the first three or five years by giving "six months' previous notice in writing," the giving of such notice in the manner specified, is a condition precedent to the exercise of such option, and must be strictly complied with.² A lease for "three, six or nine years," is a lease for nine years, determinable at the end of three or six years.³ If a lease for a term is made determinable at certain specified periods, and nothing is said as to the person by whom the option is to be exercised, *the lessee only* can exercise it, every doubtful grant being construed in favor of the grantee,⁴ but, a lease made determinable before the expiration of the term, "if the parties see fit,"⁵ can only be determined by the consent of both parties.⁶

SEC. 76. When option is personal.—If the option is confined to the parties to the lease, as, "either party may, by six months' notice in writing, determine this lease at the end of the first or any subsequent year," the option is personal and confined to the lessor and lessee, and can be exercised by no other person; but where the option is given to either party, "his executors, administrators, &c.," it is held to extend to a devisee of the lessor, who is entitled to the rent and reversion.⁷

SEC. 77. Leases for fixed term, and then from year to year.—Leases may be granted for a certain number of years, and then from year to year.⁸ Thus a demise for

¹ Friar v. Grey, ante; Porter v. Shepard, 6 T. R. 665.

² Porter v. Shepard, ante, and the notice will be inoperative if given in any other manner than that specified in the lease. Cadby v. Martinez, 11 Ad. & El. 720. If the lease requires the notice to be given *in writing*, verbal notice is insufficient, but if no other condition is imposed except that it shall be in writing of a certain number of months, the form of notice is immaterial, and any notice in writing that fully acquaints the other party of the pur-

pose to end the tenancy at a certain time is sufficient, although given in the form of a notice to quit.

Giddens v. Dodd, 3 Drew, 485.

³ Goodright v. Richardson, 3 T. R. 462; Ferguson v. Cornish, 2 Burr, 1032.

⁴ Webb v. Dixon, 9 East, 15; Dunn v. Spurrier, 3 B. & P. 399; Price v. Dyer, 17 Ves. Jr. 363.

⁵ Fowell v. Trauter, 3 H. & C. 458.

⁶ Bamford v. Hayley, 12 East, 464.

⁷ Jones v. Nixon, 1 H. & C. 48; Brown v. Trumper, 26 Beav. 11.

'a term of three years, determinable on a six months' previous notice to quit, *otherwise* to continue from year to year until the term shall cease by notice to quit at the usual times," is held to be a lease for three years certain, determinable only at the end of that period by six months' previous notice ; and if not so determined is a subsisting tenancy from year to year.¹ So a lease may be granted for a certain fixed term, with an option to the lessee to take a lease for a further term.²

The option so given may be exercised *at any time during the continuance of the tenancy*, though *after* the expiration of the term of years first specified, and passes to his assignee in bankruptcy,³ as such option is treated as a personal chattel, present and future.⁴ The fact that the tenant, who remains in possession, has done that which is inconsistent with the exercise of such option in his favor will not deprive him in all cases of its benefits. Thus, where an agreement was entered into by which A agreed to let a house to B for three years at a yearly rent, and also agreed at the request of B to grant him a lease for a term of five, seven, fourteen or twenty-one years from the expiration of such three years, at the same rent, the tenant undertaking to keep the house in repair, it was held that the tenant was entitled *four years* after the expiration of the three years occupancy, to have the agreement for the lease specifically performed, and that, neither an application made by him two years previously for a lease at reduced rent, nor an application to the landlord for payment of an amount expended in repairs (which had been allowed to the tenant by the landlord), amounted to a waiver of his rights, although the court held that he must refund the cost of the repairs.⁵

SEC. 78. Determination of term. A lease for a fixed term as for one year, or a term of years, expires by efflux of

¹ Jones v. Nixon, ante.

² Hersey v. Giblett, 18 Beav. 174.

³ Moss v. Barton, L. R. 1 Eq. Cas. 474; Hersey v. Giblett, ante.

⁴ Buckland v. Papillon, L. R. 1 Eq. Cas. 477.

⁵ Ackland v. Luttrell, 9 Ad. & El. 879. A lease for one year from April 1st, expires March 31st, succeeding. Mary's v. Anderson, ante; Biddle v. Vandevanter, 28 Mo. 500.

time upon the last moment of the last day of the term, the rule being that a lease for years lasts *during the anniversary of the day from which they are granted*,¹ and a lease made from the 25th of March, 1878, for one year, does not expire until twelve o'clock at night of the 25th of March, 1879, and an entry made by the landlord before that time without the assent of the tenant is unlawful,² and a lease made for the month of August does not expire until twelve o'clock at night of the last day of August.³

SEC. 79. **Notice to quit.**—A tenant for a term is not entitled to any notice to quit. His term expires by efflux of time on the last day thereof, and he is bound to quit at that time,⁴ and the landlord may take possession of the premises by any means short of personal violence,⁵ or he may treat the tenant as a trespasser,⁶ or as a tenant for another year upon the terms of the former lease.⁷ A disclaimer of the tenancy by a tenant for a definite term, does not cause a forfeiture of his estate,⁸ nor does payment of rent to a person not entitled to it;⁹ but *fraudulently* delivering up possession of the premises to a person claiming under a title hostile to the landlord does have that effect.¹⁰

¹ Moss v. Barton, L. R. 1 Eq. Cas. 474.

² Pugh v. The Duke of Leeds, 2 Camp. 714; Mary's v. Anderson, 2 Grant's (Penn.) Cas. 446.

³ People v. Goelet, 64 Barb. (N. Y.) 476.

⁴ Young v. Smith, 28 Mo. 65; Hendrick v. Cannon, 5 Tex. 248; Mosher v. Reding, 12 Me. 478; Lithgow v. Mood, 35 Me. 214; McClain v. Doe, 5 Ind. 237; Pierson v. Turner, 2 id. 128.

⁵ Todd v. Jackson, 26 N. J. L. 565.

⁶ Rowan v. Little, 11 Wend. (N. Y.) 616; Webber v. Shearman, 8

Hill (N. Y.) 547; Hemphill v. Flynn, 2 Penn. St. 144; Brown v. Keller, 32 Ill. 151; Den. v. Adams, 12 N. J. L. 99.

⁷ Hoof v. Ladd, 1 Cr. (U. S. C. C.) 167; Quinette v. Carpenter, 35 Mo. 522; Hemphill v. Flynn, ante; Hunt v. Bailey, 34 Mo. 257; Brewer v. Knapp, 1 Pick. (Mass.) 332; Harkins v. Pope, 10 Ala. 493.

⁸ Powell v. King, Forrest, 19; Graves v. Wells, 10 Ad. & El. 427.

⁹ Dillon v. Parker, Gow. 180; Williams v. Pasquelli, Peake, 196.

¹⁰ Ellenbrock v. Flynn, 1 C. M. & R. 137.

CHAPTER IX.

WHO MAY BE LESSORS.

SEC. 80. Generally.

SEC. 81. Lease by tenant ; valid when. How far binding upon himself.

SEC. 82. By tenant at will.

SEC. 83. By tenant by sufferance.

SEC. 84. By tenants by curtesy, dower, life, &c.

SEC. 85. Lease by tenant *per autre vie*.

SEC. 80. Generally.—Any person, who by law may hold real estate, and who is under no legal disability, may make a lease of lands that accords with his estate or interest therein ; and it seems that, even though the estate demised is in excess of his interest therein, it will be operated to the extent of his actual estate, but will not confer any right or interest that the lessor did not himself possess, as the maxim *nemo plus juris, in alium transferre potest quam ipse habet* applies.¹ But, while a lease in excess of the lessor's estate, is void as to those whose estate it infringes upon, yet, as between the lessor and the lessee, it is good by way of estoppel, as to such estate as the lessor has, and either party may maintain an action upon the lease for a breach of its conditions.² Such leases

¹Sutton's Case, 12 Mod. 557; Bragg v. Wisemen, Br. & G. 22; Howe v. Greek, 8 H. & C. 391. In Ala. Gold Life Ins. Co. v. Oliver, 78 Ala. 158, it was held that an absolute conveyance of lands by the lessor, before the expiration of the term for which they are leased, the purchaser having notice of the lease, passes to him only the reversion, which is all the estate the grantor has; and the legal effect of the conveyance cannot be varied

by proof of parol agreements, prior or contemporaneous. Rent is an incident to the reversion, and passes to a purchaser or assignee, unless served, but a note given for rent being assignable, and being assigned before a sale and conveyance of the premises to the lessee himself, the rent is thereby severed from the reversion, and the assignee is entitled to recover it.

²Yellowly v. Gower, 11 Exchq. 274.

confer no interest in the land, but are operative only by way of estoppel between the parties.' The lease, if for a longer term than the lessor possessed, operates as an assignment of such an estate as the lessor has. Thus, if a tenant for years grants a lease for a greater number of years than his estate endures, while the lease is void as to the person who leased to him, or who is entitled to the estate upon the termination of his interest, yet the lease takes effect as an assignment of his original term, and cuts off his reversionary interest therein, and consequently his right to distrain for the rent.' But, a lease executed by a person, conveying a greater interest than he possessed, only operates by way of estoppel *as to such estate as he had at the time of its execution*, and does not prevent him from setting up, as against his tenant, an after-acquired estate therein, *after the termination of the estate which he had at the time when the lease was executed.*' But the rule is otherwise when the lessor at the time of the demise *had no estate whatever* in the premises demised, as in that case, a tenancy by estoppel, and also a reversion in fee by estoppel, is created, and if the lessor subsequently acquires an estate in the premises, it inures to the benefit of his tenant, who has entered under the lease.' Where, however, a lease is executed by one who has no estate in the premises demised, the tenant who enters into possession under it is a trespasser as to the real owner.' And if he has given notes or other obligations for the rent, a court of equity will rescind the contract and enjoin the collection of the notes.' This much, in reference to leases by estoppel, has been referred to, to illus-

¹PARKE, B., in *Yellowly v. Gower*, ante.

²*Pascoe v. Pascoe*, 8 Bing. N. C. 898; *Hicks v. Downing*, 1 Ld. Rayd. 99; *Preece v. Barrie*, 5 Bing. 24; *Wallaston v. Hukewill*, 3 M. & G. 297; *Palmer v. Edwards*, 1 Doug. 187 n; *Baker v. Gosling*, 4 Moore & S. 589; *Pluck v. Digges*, 5 Bligh. N. S. 81.

³*Cuthbertson v. Irving*, 4 H. & N. 742, affd. 6 id. 185; *Leicester v. Rehoboth*, 4 Mass. 180; 4 Bacon's

Abr. (O.) 192. See LEASES BY ESTOPPEL, post.

⁴Co. Litt. 47, 227 a; 2 Rolle's Abr. 871; 4 Bacon's Abr. 189 (O.); *Jolly v. Arbuthnot*, 4 De. G. & J. 224; *Morton v. Woods*, L. R. 4 Q. B. 293. It is good against the lessor by conclusion, *Rawlyn's Case*, 4 Coke, 53 a.

⁵*Woodfall's L. & T.* 3.

⁶*Sunderson v. Lighe*, 10 Hursk. (Tenn.) 299.

trate the proposition first stated in this section. From what has been said, it will be seen, that any person legally competent to make a contract obligatory upon himself, may part with any interest that he possesses in an estate, by lease executed by him, and that this is so, however small an estate or interest therein he may possess.

SEC. 81. *Lease by tenant; valid when. How far binding upon himself.*—When a lease contains no covenant or stipulation against the sub-letting of the premises, a tenant in possession under it may sub-let the entire premises, or a part thereof, to another, to be used for any purpose not inconsistent with the demise to him,¹ or may assign the lease or his interest in the premises.² But the sub-tenant is the tenant of his lessor, and not of the original landlord.³ But, if a lessee sub-lets a part of the premises, or the whole of them, for an unlawful purpose, or for a purpose inconsistent with his lease, his lease is not thereby avoided,⁴ but the landlord may apply to a court of equity to restrain him and his sub-tenant from occupying the premises in a manner, or for a purpose inconsistent with the purposes for which it was let to the original tenant,⁵ unless the lease expressly provides that upon such use it shall be void, in which case he may treat the tenancy as at an end, and, being entitled to the immediate possession of the premises, may maintain trespass against any person who interferes with the property after the tenancy is ended.⁶ In Louisiana it is held that a

¹ *Bromlin v. Theiss*, 31 Ala. 412; *Bedford v. Terhune*, 3 N. Y. 453; *Wheeler v. Hill*, 16 Me. 329; *Healey v. Trout*, 15 Gray (Mass.) 312.

² *Cooney v. Hayes*, 40 Vt. 478; *Robinson v. Perry*, 21 Ga. 183. As to the distinction between an under-lease and an assignment, see Chapter on "Assignment of Leases," post.

³ *Curney v. McIntyre*, 38 Ga. 261.

⁴ *Healey v. Trout*, 15 Gray (Mass.) 312, nor is the lease forfeited if the defendant, without the knowledge of the lessee, uses the premises for an illegal purpose, *O'Connell v. McGrath*, 14 Allen (Mass.) 289.

⁵ In *Parkman v. Aicardi*, 34 Ala. 393, the premises were leased to the defendant, who was a druggist, and who occupied them for a drug store. Knowing that the landlord would not lease them to be used as a bar-room, he entered into an agreement to sub-let them for that purpose, and also agreed with his sub-tenant to obtain a renewal of the lease in his own name for that purpose. The court restrained him and his sub-tenant from using the premises for a bar-room.

⁶ *Shepard v. Briggs*, 26 Vt. 149. But this is only the case when such use is in violation of the express terms of the lease. *Id.*

sub-letting, in violation of the terms of the lease, entitles the landlord to have the lease dissolved,¹ but the lease is not thereby *ipso facto* dissolved, unless there is an express provision in the lease to the effect that a breach of this condition shall avoid the lease, or that, upon such breach the landlord may re-enter, in which latter case, he may elect to treat the lease as terminated, or he may waive the breach.² A mere provision or agreement that the lessee shall not sub-let, without any reservation of a right of re-entry, or provision that the lease shall therefore become void, is treated as a covenant merely, that leaves the lessor to seek relief either in an action at law, or by bill in equity.³

SEC. 82. By tenant at will.—Strictly speaking, a tenant at will has no demisable estate in the premises, as, if he leases the premises with notice to his landlord, his estate is determined by the determination of the will under which he holds;⁴ but, while he cannot as against the landlord constitute another person tenant at will, yet there seems to be no doubt but that he may make a person tenant at will as against himself⁵ if such person under a lease from him enters into possession of the premises. In such case, a tenancy by estoppel is created between him and his lessor,⁶ and is binding upon him.⁷ The estate of such under-lessee is deter-

¹ Bryan v. French, 20 La. An. 368.

² 4 Bacon's Abr. 221, Litt. s. 325; Darke v. Bowditch, 8 Q. B. 973.

³ Willson v. Phillips, 2 Bing. 18; Darke v. Bowditch, 8 Q. B. 973; Rudd v. Golding, 6 Moo. 231; Rains v. Kneller, 4 C. & P. 3.

⁴ Shaw v. Barber, Cro. Eliz. 830; Moss v. Gallimore, 1 Doug. 279, 1 Inst. 57; Sweeper v. Randall, Cro. Eliz. 156; Birch v. Wright, 1 T. R. 382; Cole on Ejectment, 449, consequently the lease determines upon the death of the landlord. Potter v. Arden, 1 B. & P. 531; Ex. Parte Smyth, 1 Swanst. 355; Simpson v. Butcher, 1 Doug. 50; Symons v. Symons, 6 Modd. 207, or of the *cestui que vie*; Bowes v. E.

London W. Co. 3 Madd. 375; Jordon v. Ward, 1 H. Bl. 97; Potter v. Archer, ante; Wynne v. Humphreys, 1 Doug. 52; Ludford v. Barber, 1 T. R. 95; Hall v. Arrowsmith, Poph. 105; Yate v. Church, 2 Cowp. 482.

⁵ Goody v. Carter, 9 Q. B. 865. Strictly speaking, the tenancy at will is ended upon a demise made by the tenant at will, but so long as his tenant occupies the estate under him, he must yield rent to him, because as between them he is estopped from denying his title.

⁶ Cole on Ejectment, 449; Blunden v. Baugh, Cro. Car. 802; Goody v. Carter, ante.

⁷ Blunden v. Baugh, ante.

mined by the determination of the estate under which his grantor holds, as no person can confer on another a greater estate than he himself has,¹ therefore, if the lessor dies,² or the *cestui que vie*,³ the estate is ended. But an under lease or an assignment of the premises or lease without the knowledge of, or notice to, the landlord, does not *per se* determine the estate. The rule is, that a tenant at will cannot determine the tenancy at will without either giving notice to the landlord, *or by transferring it with notice to him*,⁴ and in a later English case, decided in Exchequer in 1853, the court expressly decided that a sub-demise by a tenant at will does not determine the tenancy, and fully sustained the doctrine of the case last cited.⁵ The landlord may, by accepting rent from the lessee of a tenant at will, constitute such lessee a tenant at will, under him.⁶

SEC. 83. *By tenant by sufferance.*—The same rule is applicable in the case of a tenant by sufferance. He has no demisable estate or interest whatever, and cannot, as against the landlord, make another tenant by sufferance,⁷ but as against himself, by such a demise a tenancy by estoppel is created.⁸ The tenant holding under him acquires no right to the possession of the premises as against any one except the tenant under whom he holds. As to the landlord, he is a mere trespasser, and is liable to be put out of possession forcibly, without previous notice.⁹

SEC. 84. *By tenants by curtesy, dower, life, &c.*—Tenants by curtesy, in dower, or for life, may grant leases of the estate, by the common law, that will be valid and operative, *so long as their estate endures*, and no longer, as all such leases become absolutely void upon the death of the tenant in whom the estate vested.¹⁰ As to leases by ten-

¹ *Ex Parte Smyth*, 1 Swanst. 335.

² *Jordan v. Ward*, 1 H. Bl. 97; *Hall v. Arrowsmith*, Poph. 105.

³ Co. Litt. 47 b.

⁴ *Carpenter v. Colins*, Yelv. 73.

⁵ *Pinhorn v. Souster*, 22 L. J. Exchq. 266; 20 Eng. L. & Eq. 501.

⁶ *Cunningham v. Holton*, 55 Me. 33.

⁷ *LORD ELLENBOROUGH* in *Thunder v. Belcher*, 3 East, 451.

⁸ *Yellowly v. Gower*, 11 Exchq. 274; *Cuthbertson v. Irving*, 4 H. & N. 742.

⁹ *Steadman v. Gassett*, 18 Vt. 346; *Fitzgerald v. Beebe*, 7 Ark. 310.

¹⁰ *Miller v. Mainwaring*, Cro. Car. 399.

ants by curtesy and dower it is said by a learned writer¹ that, if they lease for years, reserving rent to themselves, and die, the lease is thereupon absolutely determined so that no acceptance of rent by the heir or reversioner can make it good.² "For, though their estate is *quodammo-do*, a continuance of the estate of the husband or wife, yet, it is a continuance of it only for life, and they have no power to contract for, or intermeddle with, the inheritance, and consequently their leases fall off, with the estate whereout they were derived, and from that time their lessee is a mere tenant by sufferance." But, if the heir or reversioner expressly or impliedly assents to the continuance of the occupancy by the lessee, as by accepting rent from the lessee, accruing after the death of the lessor, a new tenancy, either at will or from year to year, springs up, but, except by express contract, there can be no confirmation of the original lease for the term granted therein.³ The rent accruing prior to the death of the tenant in dower or by the curtesy, belongs to their executors, except in the case of a tenant in dower, who marries again, in which case the rent belongs to her husband or to his executors if he dies before it is paid.⁴ A lease made by tenant for life for a term, is void as to the reversioner, upon the death of the lessor, and is not confirmed by an acceptance of rent from the tenant by the reversioner, after the estate is determined, and this is so at law, even though the reversioner has suffered the lessee to go on and make improvements upon the property, after his interest vests in possession.⁵ A distinction is taken at law between a lease that is merely voidable, and one that is absolutely void, as against the party against whom it is sought to set it up. As to the former, it may be confirmed, but as to the latter it is incapable of confirmation.⁶ But in equity, if the reversioner accepts rent from

¹ 4 Bac. Abr. 126, Tit. Leases (I.), 1.

² Miller v. Mainwaring, Cro. Car. 399.

³ Bac. Arb. Tit. Leases (O.), 1.

⁴ Anonymous, Moor. 25.

⁵ Woodfall's L. & T. 7; Yates v. Church, Cowp. 482.

⁶ LORD MANSFIELD, in Yates v. Church, Cowp. 482; Mayhem's Case, 1 Coke 147; Ludford v. Barber, 1 T. R. 86; Collins v. Weller,

the lessee after the estate is determined, and knowing, or it being presumed that he knew, that the tenant relied upon a continuance of the lease for the term named therein, permits him to go on and make extensive permanent improvements upon the premises, he will be prevented from terminating the lease.' But while at law, an acceptance of rent by the reversioner does not operate as a confirmation of the lease by him, yet, such act, or indeed any act upon his part that operates an acknowledgment of the tenancy, is evidence of a new demise by him from year to year.* Where, however, the reversioner joins with the tenant for life in a lease for a term of years, the lease does not lapse by the death of the tenant for life, but during his life, is treated as his lease, and afterwards as the lease of the reversioner.' So, too, the reversioner may by acts done by him after the lease is made by the tenant for life, and before the estate is de-

7 id. 478; *Simpson v. Butcher*, 1 Doug. 50; *Aubray v. Jenkins*, Bull N. P. 96; *Cowper v. Verney*, Willes, 169. Where a lease is *ipso facto* void, by the condition or limitation, an acceptance of rent by the reversioner can be regarded as a confirmation of the lease, or as continuing it for the term named therein, but the rule is otherwise where the estate or lease is merely voidable by entry. *Finch v. Throckmorton*, Bro. Eliz. 221; Co. Litt. 295 b.; *Rickman v. Garth*, Bro. Jac. 176; *Martin v. Watts*, 7 T. R. 83; *Wynn v. Humphrey*, 1 Doug. 50 n.; *Jones v. Cowper*, Willes, 169. In the last case *WILLES*, C. J., says: "It is undoubted law that though an acceptance of rent may make a voidable lease good, it cannot make valid a lease or deed which was actually void at first."

* *Stiles v. Cowper*, 8 Atk. 692; 4 Bacon's Abr. 126, Tit. Leases (I.) 2, note a; *Anonymous*, Bimb. 52; *East India Co. v. Vincent*, 2 Atk. 83; *Blore v. Sutton*, 8 Meriv. 237; *Jackson v. Caton*, 5 Ves. 688; *Pilling v. Armitage*, 12 Vis. 78; *Dunn v. Spurrier*, 7 id. 78, and even at law acceptance of rent or other acknowledgment of a tenancy may amount to a new demise by

the reversioner from year to year. *Martin v. Watts*, 2 T. R. 83; *Tucker v. Morse*, 1 C. & Ad. 365; *Jordan v. Ward*, 1 H. Cl. 97; *Crune v. Prideaux*, 10 East, 187; *Collins v. Weller*, 7 T. R. 478, the lessee in the interval being a mere tenant at sufferance. *Preston v. Love*, Noy. 120.

* *Pennington v. Taniere*, 12 Q. B. 998; *Crune v. Prideaux*, 10 East, 187; *Tucker v. Morse*, 1 C. & Ad. 365; *Martin v. Watts*, 2 T. R. 83; *Jordan v. Ward*, 1 H. Cl. 96.

† In 4 Bacon's Abr. 127, Tit. Leases (I.), 2, the author says: "The lessors having several estates in them, in several degrees, the lease shall be construed to move out of each one's respective estate or interest, as they become capable of supporting thereof, which is the most natural and useful construction of the lease, especially as there can be no estoppel in this case, by reason of the several interests which passed from each. And therefore during the life of tenant for life, if the lessee, being evicted, should declare of a lease by both, this would be against him, as was adjudged, because, for that time, it was only the lease of the tenant for life."

terminated thereunder, confirm it, so that upon the death of the tenant for life, it will stand as his lease for the balance of the term, a distinction being taken between the confirmation of a lease while it is valid, and a confirmation after it has become void.¹ But, even where the reversioner is named in the lease as one of the lessors, if at the time of its execution he was laboring under a legal disability, as, if he was an infant, or under guardianship, or, in the case of a woman, if she was married, it is nevertheless void upon the death of the tenant for life, and unless they actually joined in the execution of the lease originally, it is not confirmed by an execution by them, after the death of the tenant for life, and after the disabilities are removed, so as to be obligatory upon the tenant, because it is not his covenant.²

SEC. 85. *Lease by tenant per autre vie.*—Where a person holds an estate *per autre vie*, a lease made by³ him is determined by the death of the *cestui que vie*,⁴ but is not determined by his own death,⁵ and may be made so as to take effect even after his death,⁶ for the land is bound with this interest of the lessee, and is entitled to it against everybody until the death of the *cestui que vie*,⁷ because the estate is vested in the tenant *per autre vie* during the life of the *cestui que vie*,⁸ and may be attained by him during his life, or by his executors or heirs after his death.⁹

¹ *Simpson v. Butcher*, 1 Doug. 50;

⁴ *Bacon's Abr.* 126, *Tit. Leases* (I.), 2.

² *Ludford v. Barber*, 1 T. R. 86.

³ *Strade v. Seaton*, 26 M. & R. 728; *Blake v. Foster*, 8 T. C. 487; *Fenner v. Duplock*, 2 Bing. 10; *Jackson v. Ramsbottom*, 8 M. & S.

516; *Hill v. Saunders*, 2 Bing. 112.

⁴ *Blackstone's Com.* 136.

⁵ *Uttly Dale's Case*, Cro. Eliz. 182.

⁶ *Co. Litt.* 41 b; *Ross v. Aldwick*, Cro. Eliz. 491.

⁷ *Rosse's Case*, 5 Coke, 18 a; *Brudnel's Case*, 5 id. 9 a.

CHAPTER X.

BY TENANTS IN COMMON OR JOINT TENANTS.

SEC. 86. By joint tenants.

SEC. 87. By co-parceners.

SEC. 88. By tenants in common.

SECTION 86. By joint tenants.—Tenants in common, or joint tenants, may join or sever in the making of leases or other conveyances, of their interest in the estate, and whether the lease is to take effect *in præ-senti* or *in futuro*, it will be operative as against those executing it.¹ But a broad distinction exists between leases made by joint tenants, and those made by tenants in common. If the former join in a lease, it is treated as but one lease made by one lessor, for they have but one estate; but if tenants in common join in a lease, it is treated as several leases of their several and respective interests.² During their joint ownership, joint tenants constitute but one tenant of the whole land, and are then said to be seized *per tout*, but for the purposes of alienation, they are seized or possessed *per my*.³ Therefore it follows that each of them is seized *per my et per tout*, and while either may make a lease of the whole estate, yet, no more than his interest therein will be affected by it. The lease, although joint in point of duration, is nevertheless several and distinct as to the terms granted, because they arise from the several interests of several persons.⁴ When joint tenants join in a lease it endures, and

¹ Co. Litt. 168 b; Rolles' Abr. 488; id. 447; 8 Beacon's Abr. 688, Tit. Joint Tenants (G.), 1.

² Comyn's Dig. Tit. Estates (G.), 6; Jourdain v. Steere, Cro. Jac. 88.

³ Co. Litt. 186 a.

⁴ Morris v. Barry, 1 Wils 1; Bel-
lingham v. Alsop, Cro. Jac. 58;
Roach v. Williams, 3 Treadw.
(S. C.) 202.

the term and estate continues, although only a tenancy at will is created, even though one of the lessors dies, and the rent inures to the survivors.¹ Yet either may put an end to the tenancy as to the whole estate, even against the express wish of his co-tenant,² and a notice to quit given by one, is a notice by all, in legal effect.³ In the case last cited, LORD TENTERDEN, C. J., said: "Upon a joint demise by joint tenants, upon a tenancy from year to year the true character of the tenancy is this, not that the tenant holds of each, the share of each so long as he and each shall please, but that he holds the *whole* of *all* so long as he *and all* shall please; and as soon as any *one* of the joint tenants gives a notice to quit, he effectually puts an end to *that* tenancy; the tenant has a right, upon such a notice, to give up *the whole*, and unless he comes to a new arrangement with the other joint tenants as to their shares *he is compellable to do so.*" But, where a specific mode is provided in the lease for putting an end to the tenancy and that mode contemplates that *all* the lessors shall join in giving notice to quit, a notice by one or more of them, but not by all, will be ineffectual.⁴ If joint tenants join in a lease, either by parol or by deed full, reserving rent to one only, the reservation inures to both in respect of the joint reversion,⁵ but, if the lease is by in-

¹ In *Henstead's Case*, 5 Coke, 10 b, the rule is stated thus: "If two joint tenants make a lease at will, rendering rent, and one dies, all survives to the other; and if the lessee continues his possession, the survivor shall have an action for the whole rent for the privity, and it shall not be a countermand for one moiety for the mischief that might ensue to lessors, and the rather, because no mischief can come to the lessees in such case." See also 8 Vin. Abr. Estate (Z.), b; Comyn's Dig. Estate by Grant, H., 4 Platt on Leases, 125; Co. Litt. 17 a, 192 a, 214 a.

² Co. Litt. 186 a; *Whayman v. Chaplin*, 8 Taunt. 120.

³ *Aslin v. Summersett*, 1 B. & Ad. 141.

⁴ In *Right v. Cuthell*, 5 Esp. 149 affd. 5 East, 491, the premises were

demised to the defendant for 21 years, subject to a provision that in case the landlord or tenant, their heirs, executors, &c., should elect to do so, either might put an end to the lease at the end of seven or fourteen years of the term, by giving six months' notice in writing under his or their respective hand or seal to or for the other or others, &c. The lessor died, and three persons were appointed executors. Two of the executors—the third being absent from the country—joined in a notice in writing to the defendant, to quit the premises at the end of the first fourteen of the term. The court held that this notice was not sufficient, as *all* the executors should have joined in the notice to quit.

⁵ *Sacheverel v. Frogate*, 1 Vent. 161; Co. Litt. 47 a, 192 a, 214 a.

denture, it is held that the other is estopped from denying the reservation.¹ When joint tenants join in a lease, reserving an entire rent, one of them cannot sue in debt for it, in his own name.² He may distrain for the rent, but he must avow in his own right, and as a bailiff of his co-tenants.³ But, while he cannot maintain an action of debt for the rent in his own name accruing under a joint demise, yet payment of the rent to one joint tenant is payment to all, and a bar to a recovery thereof by suit in the name of all.⁴ One joint tenant may lease his share of the estate in opposition to the express wish of his co-tenant, and "as each of them hath an estate for his own life and for the life of his co-tenant, if one of them makes a lease, it shall continue not only during the life of the lessor, but also after his death, during the life of his co-tenant; for the lease, which is only derivative, shall continue as long as the original estate out of which it was derived,"⁵ and he may make a lease to commence *in futuro*, even after his death, and it will bind his co-tenants,⁶ and this is held to be the case where they are joint tenants for the lives of each; as, if one makes a lease of his moiety of the estate, reserving rent to himself and his heirs, and dies, the term continues, but the lessee holds it discharged of rent, because the heirs of the lessor have no reversion,⁷ and the survivor cannot have it, because he comes in by title paramount to the lease.⁸ One joint tenant cannot, in the absence of authority from his co-tenants, make a lease of more than his share of the estate,⁹ and, even though the lease purports to be by all, yet if it was only executed by one, it is operative only upon his share, and,

¹ *Sacheverel v. Frogate*, 1 Vent. 161.

² *Co. Litt.* 180 b, *Litt.* § 811.

³ *Bonoyan v. Palmer*, 5 Mod. 71; *De Charms v. Harwood*, 10 Bing. 526; *Stedman v. Page*, 5 mod. 141; *Pullen v. Palmer*, 5 id. 150.

⁴ 1 *Platt on Leases*, 127.

⁵ *Wigg's Case*, 3 Salk. 204.

⁶ *Herbin v. Chard*, Poph. 96; *Grute v. Locroft*, Cro. Eliz. 287; *Anonymous*; 2 *Dyer* 187 a; *Harbin v. Barton*, Mo. 492; *Whitlock v.*

Horton, Cro. Jac. 91; *Smallman v. Agborow*, id. 417.

⁷ *Anonymous*, 2 *Dyer*, 187 a. But see 4 *Bacon's Abr. Tit. Leases*, p. 131, where he adds a *quere* whether the executors or administrators cannot maintain an action of debt or covenant, either upon the covenant in law or express covenant for payment of money, if there be any.

⁸ 4 *Bacon's Abr. Tit. Leases*, 131.

⁹ *Bond v. Cartwright*, 1 Vent. 136, 162.

although the rent is reserved to all, he may maintain an action for the payment of his share of the rent, reserved to all,¹ or may distrain for it *upon any part of the land.*² A distinction exists between a lease made by a joint tenant for a term, and a devise of the same by him. The former, says Bacon,³ "is good, and shall bind the other if he survives *because this is a present disposition and binds the land from the time of the lease made* so that he cannot avoid it. But a devise for years * * would not bind the other, *because that is no present disposition, nor binding upon the devisor himself*, inasmuch as he may revoke or cancel his will, and so destroy that devise. So," he adds, "all grants or charges by one joint tenant out of the land, *fall off with his life*, and cannot affect the survivors, because there being no immediate disposition of the land itself, *that comes whole and entire to the survivor under the first title*, and, by consequence, overreaches all intermediate charges or grants thereout, by other joint tenant, who is dead."⁴ Where two persons are joint tenants for their lives, and one of them makes a lease for a specific term, if he and his co-tenant shall live so long, the lease is determined by the death of either, and this is so, even though after the death of his lessor, the lessee surrenders his lease and takes back a new estate.⁵ "One of the peculiarities attending the relation of joint tenants," says MR. PLATT,⁶ "for life, renders it necessary to guard against a severance, the effect of which is to create a tenancy in common, and thus destroy the interest which each co-tenant previously had in the other's life, as well as his own." Thus, where a lease was made to two joint tenants for years, with a proviso that if the lessees

¹ Co. Litt. 192 a, and even where joint tenant sues for the whole rent or for the whole land, he shall not upon that ground be non-suited, but is entitled to have judgment for his share. *McFadden v. Hawley*, 2 Bay. (S. C.) 457, but if the non-joinder of his co-tenants is pleaded in abatement, the action will fail. *Frazier v. Spear*, 2 Bibb (Ky.), 385, but the rule is otherwise in South-Carolina, *Watson v. Hill*, 1 McCord

(S. C.) 161. See also *Rube v. Fyler*, 14 Miss. 440.

² 8 Bulstr. 133.

³ 4 Bacon's Abr. 181, Tit. Leases (I.) 5.

⁴ See also as to the distinction between the conveyance of an immediate interest in the land and a devise, Co. Litt. 186.

⁵ *Daniel v. Waddington*, Cro. Jac. 377.

⁶ 1 Platt on Leases, 128.

die within the term, it shall cease, and the lessees make partition and one of them aliens his part and dies, the lessor cannot enter upon the part of the deceased lessee, but the grantee, or if he has not aliened, the executors of the lessee, are entitled to hold the same during the life of the survivor.' But where the lease is to two, "for the term of their lives, and they make partition, and one dies, his part reverts to the lessor ;¹ and if the lease is to them for a specific term, if they shall live so long, the estate is determined by the death of either.' A joint tenancy is severed by a conveyance made of the reversion by one joint tenant to his co-tenant,² or by a descent of the reversion to one of them,³ or by an act of any of them that cuts off his reversion,⁴ or by any order of court directing division of the estate.⁵ So, too, there may be a suspension of the joint tenancy for a period, and a tenancy in common created in the interim, and the joint tenancy will spring up again upon the determination of the intervening estate.' Thus, if one joint tenant leases to his co-tenant for a term, the jointure is suspended during the term ; and if there be three or more, the lessee of one would hold the share demised to him as tenant in common with the others ;⁶ and where one tenant leases his share to a stranger, the jointure is severed during the term demised ; but if a chattel interest only is demised, the jointure is neither severed nor suspended.⁷ But no conveyance made by one

¹ Farrington's Case, 1 Dyer, 67 a.

² Brudnel's Case, 5 Coke, 9 a. See also Daniel v. Waddington, Cro. Jac. 877.

³ Hill v. Bolton, Lutw. 477 ; Eustace v. Scoyen, 2 Roll. 473. The peculiar properties of an estate by joint tenancy are, 1st, a unity of interest ; 2d, a unity of title ; 3d, unity of time, and, 4th, unity of possession. Co. Litt. 188, and these elements must all exist, or there is no joint tenancy. Therefore it follows that the destruction of any one of them destroys the tenancy. 2 Blackstone's Com. 185.

⁴ 2 Aud. 202. A devise does not

produce a severance under the provisions of the Act of 1705 in Pennsylvania. Duncan v. Faorer, 6 Binn. (Penn.) 198. A partition fence run through the middle of land held in joint tenancy, does not create a severance, although the tenants occupied on either side only to the fence. Haughabaugh v. Honald, 1 Treadw. (S. C.) 80.

⁵ Hill v. Bolton, ante.

⁶ Pastell v. Skirving, 1 Dessau (S. C.) 158.

⁷ Litt. S. 302, Co. Litt. 192 a, 193 a, 214 a.

⁸ Jurdain v. Steere, Cro. Jac. 88 ; Blackspeer's Case, Noy. 13.

⁹ Co. Litt. 185 a.

joint tenant can divest his co-tenant of his moiety of the estate.' The common law rules in reference to a joint tenancy have been essentially modified in most of the States by statute,¹ while in others this species of tenancy has been abolished,² and in others, conveyances that at common law create a joint tenancy, except in certain special cases, where the intent of the grantor to create such an estate is clearly expressed, are by statute construed as creating a tenancy in common only.³

SEC. 87. By Co-parceners.—Estates by co-parcenary arise under the common law, or by particular custom where lands of inheritance descend to two or more persons, as where a tenant in fee or in tail dies, leaving several daughters and no sons, or several sisters, and no issue, father or brother; or several aunts and no issue, the lands descend among all the daughters, sisters, aunts, &c., equally, and they all make but one heir, and are called co-parceners.⁴ This species of estate is in many respects similar to that of joint tenants. That is, they have the same unities of interest, title and possession, but there is no unity of time, nor entirety of interest, nor is there any survivorship among them,⁵ and each part descends to their respective heirs, though the unity of possession continues; and, as long as the lands continue in a course of descent and united in possession, they remain co-parceners, whether the lands have descended to males or females,⁶ but whenever one of them aliens, or whenever a partition is made, the lands cease to be held by them as co-parceners, but as tenants in common,⁷ and the same

¹ Bigelow v. Topliff, 25 Vt. 273; Carlyle v. Patterson, 3 Bibb. (Ky.) 98; White v. Brooks, 43 N. H. 402; People v. Marshall, 8 Cal. 51.

² In North Carolina in 1874, the right of survivorship was abolished by statute, and the share of each tenant made to descend to his heirs. So in Virginia by Act of 1786, which went into operation July 1st, 1877. In Alabama, Clay's Dig. 169.

³ This is the case in California.

⁴ Miller v. Miller, 16 Mass. 59;

Haughabaug v. Honald, 1 Treadw. (S. C.) 90; Thornton v. Thornton, 3 Rand. (Va.) 188; Cambaugh, v. Bambaugh 11 S. & R. (Penn.) 190; Boston, &c. Co. v. Condit, 19 N. J. Eq. 394.

⁵ Comyn's Digest, Tit. Parceners (A.), 1; 2 Blackstone's Com. 187.

⁶ Blackstone's Com. 188; Buller's N. P. 107; Co. Litt. 164 a; Woodfall's L. & T. 13.

⁷ Litt. § 309.

⁸ 2 Black. Com. 189.

result ensues, when the lands descend to and vest in a single heir, or indeed whenever either of the three elements requisite to create this estate are destroyed.¹ Co-parceners may, so long as the estate continues, join in a lease, or each may make a lease of her own share, and, even though they join, it operates as the separate demise of each, and must be so plead,² and they hold the rent in common.³ So long as they remain co-parceners the lease of one, of her share, is good; but if the estate is partitioned and the share leased is allotted to a co-parcener, the lease is thereby invalidated.⁴ They may sue and be sued jointly as to any matter pertaining to the estate, but neither can sue separately for her share of the rent accruing to her and her co-parceners.⁵

They cannot sever in an avowry for rent,⁶ but each must avow in her own right, and as plaintiff for her co-parceners for the entire rent.⁷ The co-parceny is not severed by the execution by one of a lease for life,⁸ but such a lease prevents a partition between them,⁹ but a lease for years does not.¹⁰

SEC. 88. By tenants in common.—A tenancy in common differs from a joint tenancy, in that, in the former, there is no unity, except of possession. The tenants hold by several and distinct titles and all occupy promiscuously. BLACKSTONE says:¹¹ "This tenancy therefore happens where there is a unity of possession merely, and, perhaps, an entire disunion of interest, of title and of time." One tenant may hold in fee, another for life, or even for a

¹ 2 Ibid. 191.

² Millner v. Robinson, Moor, 939; Woodfall's L. & T. 13.

³ 2 Preston's Abstract, 74.

⁴ Co. Litt. 46, n 5.

⁵ Ducharme v. Harwood, 10 Bing. 526.

⁶ Page v. Stedman, Carth. 364; Anonymous, Mo. 3, pl. 110; Ducharme v. Harwood, ante; Stedman v. Bates, 1 Ld. Rayd. 64.

⁷ Page v. Stedman, ante. See cases cited in preceding note.

⁸ Co. Litt. 192 a.

⁹ Ibid. 167 a.

¹⁰ F. N. B., 62 H.; Co. Litt. 167 a.

¹¹ 2 Blackstone's Com. 192. There need not be unity of tenure, in the different parts of the land, nor unity of estate in the several owners thereof; *unity of right of possession* is all that is necessary. Putnam v. Ritchie, 6 Paige Ch. (N. Y.) 390. Neither tenant can take exclusive possession of the premises as against his co-tenant. McGarrell v. Murphy, 1 Hilt. (N. Y. C. P.) 132, and if one co-tenant, or any person under him, enters and ousts the other, he is liable in trespass *quare clausum fregit*. Erwin v. Olmstead, 7 Cow. 227.

term ; and one may hold one-half, and another a third, and another the balance, so that none of the elements requisite to create or uphold a joint tenancy except unity of possession concur in this species of tenancy. Indeed, in most of the States, it is now provided by statute, that all conveyances shall be so construed as to create a tenancy in common, instead of a joint tenancy, except where the grantor expressly evinces an intention to create the latter species of estate, so that it is not necessary to say anything as to the methods by which this species of tenancy or estate is created.

One tenant in common, like a joint tenant, may make a lease of his moiety of the estate, but, unless clothed with express authority to that end, by his co-tenant, he cannot make a binding lease of the whole,¹ nor can he by any sale or conveyance divest his co-tenant of his interest in the property,² and a mortgage made by him upon his undivided interest, has no validity as against his co-tenant.³ He cannot convey a distinct part of the estate by metes and bounds, so as to bind his co-tenant,⁴ but he may do

¹ *Mussey v. Holt*, 24 N. H. 248; *Taintor v. Cole*, 120 Mass. 174.

² *White v. Brooks*, 43 N. H. 402; *Biglow v. Topliff*, 25 Vt. 273. He has no more power to convey his co-tenant's interest in the estate, than a stranger. *Blood v. Goodrich*, 9 Wend. (N. Y.) 68.

³ *Marks v. Sewell*, 120 Mass. 174.

⁴ *Mattox v. Hightshur*, 39 Ind. 95; *Shepardson v. Rowland*, 28 Wis. 108; *Good v. Coombs*, 28 Tex. 84; *McKey v. Welch*, 22 id. 390; *Whitton v. Whitton*, 38 N. H. 127; *Gates v. Solomon*, 35 Cal. 576; *Griswold v. Johnson*, 5 Conn. 368; *Jewett v. Stockton*, 3 Yerg. (Tenn.) 492; *Callow v. Hale*, 47 N. H. 547; *Blossom v. Brightman*, 21 Pick. (Mass.) 285; *Peabody v. Minat*, 24 id. 339, because he cannot partition the estate without the assent of his co-tenant. His title is to an *undivided* interest, and one of the peculiarities of the estate is, that they occupy promiscuously, and neither knows which part of the estate is his. *Duncan v. Sylvester*, 24 Me. 482; *Holcomb v. Coryell*, 11 N. J. Eq. 394; *Boston, &c. Co. v. Condit*, 16 N. J.

Eq. 394; but in Missouri it has been held that the conveyance of his interest by one tenant, by metes and bounds is valid, even as against his co-tenant, *Barnhart v. Campbell*, 50 Mo. 597. There can be no doubt but that it is binding where a division has been agreed upon by the tenants even by parol, followed by an occupancy by each, of their respective shares. *Wood v. Fleet*, 36 N. Y. 499; or, but that it would bind himself. *Crocker v. Tiffany*, 9 R. I. 505; and every one except his co-tenants, *Nichols v. Smith*, 22 Pick. (Mass.) 816; and where he has accepted and improved a certain part of the estate, he is entitled, upon a partition of the land, to have the part so improved by him set off as his share (*Pope v. Whitehead*, 68 N. C. 101), and upon this ground he may convey this distinctive part, and the right passes to his grantee, so that he can insist, in case of a partition, to have so much of the improved estate set off to him as is covered by his grantor's title or share. *Barnhart v. Campbell*, 50 Mo. 597. As his deed is valid as

so when a parol division, followed by occupancy of their respective shares, has been made,¹ or, as he is entitled upon a partition to have a portion of the estate occupied *and improved* by him, set off upon his share, he may convey this right to another.² So where a conveyance has been made by metes and bounds, if the co-tenants have acquiesced therein, or have in any manner confirmed it, they will be bound.³ When there are mines, quarries or other valuable deposits upon or in the land, they belong to the tenants in common according to their respective interests, and one of them cannot convey, either by deed or lease, an undivided interest in the ores, quarries, &c., in a particular part of the estate, without the assent of his co-tenants, but only an undivided interest in them, in the whole estate.⁴ One tenant cannot create an easement against the premises.⁵ There may be a partition of the land, and a tenancy in common of the ores and quarries in or upon it, when the parties so agree,⁶ and the mixed estate

against his co-tenants, to the extent of the interest he had in the estate (*Primm v. Walker*, 88 Mo. 94), and while a conveyance of the whole estate is invalid as to his co-tenants, yet if the grantee enters under the conveyance, he may set up the Statute of Limitation against the other tenants. *Bogardus v. Trinity Church*, 4 Paige Ch. (N. Y.) 178; *Horne v. Howell*, 46 Ga. 9; but when the tenant himself seeks to set up the statute, he must not only show an undisturbed possession for the statutory period, but also a possession under a claim of right to the whole, and of such a character as to operate as an ouster of his co-tenant, *Reed v. West*, 16 Gray (Mass.) 273.

¹ *Wood v. Fleet*, 36 N. Y. 499; *Conkling v. Brown*, 57 Barb. (N. Y.) 265.

² *Pope v. Whitehead*, 68 N. C. 191. In order to entitle him to this equitable partition, it is only necessary that they should have been honestly made for the purpose of improving the property, and not to embarrass his co-tenants or acquire an undue advantage over them in the division of the estate, and it is no bar to

such an equitable partition that he knew that an undivided share in the estate was outstanding. *Hall v. Piddock*, 21 N. J. Eq. 311.

³ *Hartford & Salisbury Ore Co. v. Miller*, 41 Com. 112.

⁴ *Marsh v. Holley*, 42 Conn. 433.

⁵ *Crippen v. Morse*, 49 N. Y. 63. Thus the owner of one third, one half, or any other portion of premises as tenant in common, cannot set apart a portion of the lot for a private way for himself, as if he were sole owner. He cannot burden the common estate with any easement or exclusive benefit for himself, nor can he give such right to a stranger. *Reed v. West*, 16 Gray (Mass.) 273. Nor can he, upon a sale of his interest in the premises, reserve a right of way over any other easement in the estate, because the reservation attempts to create a several, limited interest in the lands held in common. *Marshall v. Trumbull*, 28 Conn. 183. So a reservation of mines, made in a conveyance of the land, has been held void. *Adams v. Briggs Co.* 7 Bush. (Mass.) 361.

⁶ *Coleman's Appeal*, 62 Penn. St. 252.

thus created will be upheld by the courts.¹ As one tenant in common is not entitled to exclusive possession of the estate, it follows that he cannot confer such right upon a stranger, either by lease or deed, and in either case, if it is attempted to hold the occupancy of the whole estate, the other co-tenant has a right to take peaceable possession thereof, although such possession is acquired by stealth, provided nothing is done by him in making such entry to create a breach of the peace; and, after he is in peaceable possession he may maintain it by force, and if his co-tenant, or any person holding under him, regains possession, and forcibly ejects him, he is liable for an assault and battery.² But if the whole estate is leased by one co-tenant and his lessee is permitted to occupy it, the lessee is not liable to the other co-tenant for the rent of his share of the premises, unless there is an express agreement by him to pay the co-tenant his share of the rent,³ nor can the other co-tenant take or claim for his own use any part of the products of the estate, as against the lessee, whether the same consist of vegetables or grains, or ores or stones quarried or dug from the land,⁴ or lumber cut therefrom.⁵ From what has been previously stated, it follows that one tenant in common by a lease can give his lessee no greater right than he possesses in the estate,⁶ and that the lessee cannot lawfully oust his lessor's co-tenants; but while this is the strict legal and equitable rule, yet, if the lease covers the entire estate, and the co-tenants do not interfere with the lessee's possession, he is bound to pay the whole rent to his lessor, and cannot be compelled, nor has he the right to pay any part of it to his lessor's co-tenants,⁷ nor can such

¹ Ibid.

² Wood v. Phillips, 43 N. Y. 73.

³ In Wilcox v. Wilcox, 48 Barb. (N. Y.) 327, the husband of one tenant in common occupied the whole estate, and it was held that he was not liable to account to her co-tenants either for rents or profits, unless he had expressly agreed to do so. The contract between the co-tenant and his tenant is personal, and cannot be made available

by another. The remedy of the other tenant in common is against his co-tenant who has received the rent. Hannan v. Osborn, 4 Paige, Ch. (N. Y.) 336.

⁴ Blewett v. Coleman, 40 Penn. St. 45.

⁵ Baker v. Wheeler, 7 Wend. (N. Y.) 505.

⁶ Procter v. Newhall, 17 Mass. 81.

⁷ Hannan v. Osborn, ante; Grossman v. Lauber, 28 Ind. 618, and

co-tenants claim or take anything produced by him from the common estate, but must look to their co-tenant alone for redress.¹ They may join in a lease, and, before suit brought therefor, either of them may receive the whole rent and give a valid discharge therefor,² but not afterwards except to the extent of his interest.³ The tenant of one tenant in common is entitled to the possession of the whole estate as to everybody except his lessor's co-tenants, and may maintain such possession by force or by proper action,⁴ but if the co-tenant takes peaceable possession of the land, he is not liable to the lessee for such possession;⁵ but if he enters forcibly he is a trespasser.⁶ When tenants in common have joined in a lease of the common estate, they may maintain a joint action of debt for the rent, or may join in a distress therefor,⁷ and it has been held that one tenant cannot proceed upon such joint demise to recover for his share of the rent, in an action in his own name;⁸ but, whatever may formerly have been the rule, it is now held in England that co-tenants who join in a demise of the common estate with an entire rent reserved, may join or sever in an action of debt therefor, at their election,⁹ and if the lease be for life, they *must* sever.¹⁰ But if under a joint demise each of the co-tenants has received from the ten-

payment to the leasing tenant is a bar to an action for the rent by the others. *Id.*

¹ *Blewett v. Coleman*, 40 Penn. St. 45.

² *Decker v. Livingston*, 15 John, (N. Y.) 479; *Massie v. Long*, 2 Ohio 287.

³ *Wilson v. Gamble*, 9 N. H. 74; *Gask v. Keneda*, 29 Barb. (N. Y.) 120.

⁴ *Collier v. Corbett*, 15 Call. 183; *Hart v. Robinson*, 21 id. 346.

⁵ *Hooper v. Meyer*, 1 Nev. 438.

⁶ *McGarrell v. Murphy*, 1 Hilt. (N. Y. C. P.) 132; *Bradburne v. Batfield*, 14 M. & W. 567; *Burne v. Cambridge*, 1 Moo. & Rob. 539; *Midgeley v. Lovelace*, Carth. 289; *Martin v. Crompe*, 1 Ld. Rayd. 341; *Anonymous*, Cadb. 283.

⁷ *Jones v. Gundrim*, 3 W. & S. (Penn.) 581.

⁸ *Gaines v. Buford*, 1 Dana (Ky.) 481; *Kitchin v. Buckley*, 7 Rayd. 80; *Greenwood's Case*, Clayt. 28; *Kitchen v. Compton* (probably same case cited *ante*), 1 id. 157; *Cole v. Banbury*, 1 Sid. 49; *LITTLETON*, in *Lit.* § 316, says: "If two tenants in common make a lease of their tenements to another for a term of years, rendering them a certain rent yearly during the term, if the rent be behind, &c., the tenants in common shall have an action of debt against the lessee, and not *divers actions*, for that the action is in the personality."

⁹ *Bradburne v. Botfield*, 14 M. & W. 567; *Huntley's Case*, 3 Dyer, 326 a; *Powis v. Smith*, 5 B. & Ald. 851; *Burne v. Cambridge*, 1 Moo. & Rob. 539.

¹⁰ *Anonymous*, Gadb. 283, pl. 404.

ant, his share of the rent, or if notice has been given the tenant he must pay each of the lessors his share of the rent, which he does, the co-tenants should not join in an action of debt for the rent, as from these facts the jury may find a new contract of demise, with a separate reservation of rent to each, and in such case, the joint action could not be maintained.¹

While co-tenants may join in an action upon a joint demise, yet, as a joint demise by them is, in legal effect, a separate demise by each of their respective shares, if one of them dies, pending the lease, the surviving tenants cannot maintain an action of debt for the whole rent, declaring on a joint demise,¹ and a declaration in debt by the surviving tenant, alleging that he and the deceased tenant were seized of the entirety of the premises, cannot

¹In *Powis v. Smith*, ante, the premises were demised by two tenants in common, and the rent was for a time paid to an agent of both; but after a time notice was given to the tenant to pay the rent to each of the two, and the rent was so paid and separate receipts given. Subsequently, the rent not being paid, they brought a joint action for the use and occupation of the premises. The court held, that it was a question of fact for the jury, whether it was the intention of the parties to enter into a new contract of demise with a separate reservation of rent to each, and the court below, not having submitted this question to the jury, but having held as a matter of law that only separate actions could be brought, a new trial was ordered, *ABBOTT, C. J.*, saying: "It is clear that if there be a joint lease by two tenants in common, the two may join in an action brought to recover the rent; but if there be a separate reservation to each, then there must be separate actions. Here, by the original contract, there was a letting of the whole premises by the two tenants in common, at an entire rent; afterwards, the rent was severed. It became a question of fact upon the whole evidence, whether the parties thereby meant to enter into a new contract with a separate reservation

of rent to each, or whether they meant to continue the old reservation of rent, each of the plaintiffs receiving his own moiety."

See *Nixon v. Potts*, 1 Hawks (N. C.) 469; *Hoyle v. Stone*, 2 Dev. (N. C.) L. 818. On the several demise of one tenant in common, the plaintiff in ejectment may recover his term in the undivided share of that tenant, but the lessors of the plaintiff must at their peril take out a writ of possession only for land to which they have title. *Godfrey v. Cartwright*, 4 Dev. (N. C.) 487. Where two tenants in common recover land in ejectment, of their co-tenant by a joint action, they may also maintain a joint action for *mesne profits*. *Camp. v. Hamesley*, 11 Ired (N. C.) L. 211. In *Harrison v. Barnaby*, 5 T. R. 249, it was held that, where, after notice not to do so, a lessee pays all the rent to one tenant, the other tenant may distrain for his share of the rent, and payment to his co-tenant is no bar or defence thereto.

¹*Burns v. Cambridge*, 1 Moor Rob. 539. Where co-tenants all concur in a lease, it operates as the separate demise of each tenant of his part of the estate, and not as the joint demise of all, and should be so stated in the pleadings: *Challoner v. Dawes*, 1 Ld. Rayd. 400. *Mantle v. Wallington*, Cro. Jac. 166; *Bacon's Abr. Tit. Joint Tenants* (H), 1.

be supported.¹ Tenants in common cannot bring a joint action of account rendered to recover the proceeds of it from one who is liable on an implied contract to account with them. Each must bring his separate action,² nor can they join in a real action, as ejectment, trespass, &c. to try title against a stranger, because the title being several, the action follows its nature, and must be several also.³ So where they take their estates derivatively by devise or purchase, they must sever⁴ as, for double rent for holding over, where there was no joint devise.⁵ In an action of debt by one tenant for his share of rent, due from a lessee, he must not declare for a specific sum, but for his moiety of the whole;⁶ but this rule does not prevail where covenant is brought. In the latter case, the tenant may declare either way.⁷ In all cases when tenants in common make a separate demise, whether by distinct leases or by one they *must* sever because they can join only when the demise is joint upon its face.⁸ In all cases where the cause of action is entire, they must join, although the covenant is entered into "with them and each and every of them." "The rule as stated by Lord DENMAN, C. J.," is that "where the legal interest *and cause of action* of the covenanters are *several*, they should sue separately, though the covenant be joint in them; *"but the several interest and the several ground of action must distinctly appear*, as in the case of the covenants to pay separate rents to tenants in common, upon demise

¹ Co. Litt. 197 a.

² McCreavy v. Ross, 7 Watts (Penn.) 488.

³ Grassmeyer v. Beeson, 18 Tex. 753; Bryant v. Wippel, 1 Esp. 360; Worthington v. Weston, 2 Wills. 283; Moore v. Fursden, 1 Shaw, 842; Mantle v. Wallington, Cro. Jac. 166; Pullen v. Palmer, 3 Salk. 297; Harrison v. Barnby, 5 T. R. 249.

⁴ Wilkinson v. Hall, 1 Bing. N. C. 713; Cutting v. Derby, 2 W. Bl. 1077.

⁵ Wilkinson v. Hall, ante.

⁶ Henniker v. Turner, 4 B. & C. 157; Martin v. Crompe, 1 Ld. Rayd. 341. In Virginia it is held that all joint tenants or tenants in common, *must* join in an action for rent,

and that the omission of one or more of them as a party plaintiff may be taken advantage of upon the trial without pleading it in abatement. Newton v. Reardon, 2 Cr. C. C. (U. S.) 49.

⁷ Henniker v. Turner, ante.

⁸ Wilkinson v. Hall, 1 Bing. N. C. 713; Powis v. Smith, 5 B. & Ald. 851; Foley v. Addenbrooke, 4 Q. B. 197.

⁹ Foley v. Addenbrooke, 4 Q. B. 197; Slingsby's Case, 5 Coke, 18 b; Eccleston v. Clipsham, 1 Saund. 153; Withers v. Bircham, 3 B. & C. 254; Windham's Case, 5 Coke, 8 a.

¹⁰ Foley v. Addenbrooke, 4 Q. B. 297-8.

by them." If, however, *the cause of action is joint*, the action must be joint, though the interest is several,¹ and in all cases, if the covenanters *can* sue jointly, they are bound to do so.² But it is held in Maine that where they all take their title under the same deed, they may or may not join in an action for a breach of the covenant of warranty at their election,³ so one or more may join in an action against a stranger for trespass, and recover against one who has no title.⁴ So they may join in an action for waste,⁵ and must join in replevin,⁶ or in any action, *ex contractu*, when the contract was made with all of them.⁷ So they may all join for injuries to personal property owned by them in common.⁸ So in action against an agent of all of them, to recover a balance in his hands, stated as due to the owners.⁹ So in trover for common property,¹⁰ or in trespass for injuries to personal property, or in a personal action of trespass to lands.¹¹ They cannot join in a *qui-tam* action unless expressly so provided by statute,¹² nor for injury from a vexatious suit.¹³ They cannot be joined as defendants,

¹ *Coryton v. Lithebye*, 2 Saund. 115. In 2 Viner's Abr. 55, pl. 46, it is said "If two persons have an *entire* joint damage, they may bring a joint action though their *interests* are several," and this rule has been adopted in numerous cases. *Wilkinson v. Hall*, 1 New. Cas. 713; *Martin v. Crompe*, 1 Ld. Rayd. 340; *Foley v. Addenbrooke*, ante; *Withers v. Birtham*, 3 B. & C. 255; *Eccleston v. Clipsham*, 1 Saund. 153; *Slingsby's Case*, 5 Coke, 18 a; *James v. Emery*, 5 Price, 533; *Southcote v. Hoare*, 3 Taunt. 89; *Matthewson's Case*, 5 Coke, 23 a; *Collins v. Prosser*, 1 B. & C. 682. The word *separate* makes a covenant several. *Matthewson's Case*, ante.

² *Petrel v. Bury*, 3 B. & C. 353. LORD DENMAN, C. J., in *Foley v. Addenbrooke*, 4 Q. B. 208.

³ *Swett v. Patrick*, 11 Me. 179; *Paul v. Whitman*, 3 Watts (Penn.) 407.

⁴ *Clarke v. Vaughn*, 8 Conn. 191. In Kentucky it is held that persons owning distinct parcels of land under the same entry may

join against the holders of an adverse title. *Smith v. Harrow*, 1 Bibb. (Ky.) 97.

⁵ *Greenly v. Hall*, 3 Han. (Del.) 9.

⁶ *Smart v. Wathen*, 8 Mo. 522; *McArthur v. Lowe*, 15 M. 245.

⁷ *White v. Curtis*, 35 Me. 534; As for goods sold by them jointly, so where insurance is procured by them upon the common property in the names of all, they must all join to recover the amount of the loss. *Blanchard v. Dyer*, 21 Me. 111. So they must all join in assumpsit for a tort waived. *Gilmore v. Wilber*, 12 Pick. (Mass.) 120.

⁸ *Pickering v. Pickering*, 11 N. H. 141; *Glover v. Austin*, 6 Pick. (Mass.) 571.

⁹ *Jellison v. LaFonta*, 19 Pick. (Mass.) 244.

¹⁰ *Parker v. Parker*, 1 Allen (Mass.) 245.

¹¹ *Gent v. Lynch*, 23 Md. 58.

¹² *Hill v. Davis*, 4 Mass. 187; *Vinton v. Walsh*, 9 Pick. (Mass.) 87.

¹³ *Ainsworth v. Allen*, Kirby (Conn.) 145.

except for their joint acts. If there are several tenants claiming under distinct titles, they cannot be joined in one action as defendants, and if they are, they may plead the misjoinder in abatement.¹ But the rule is otherwise by statute in Kentucky as to matters relating to the common estate.² One tenant in common cannot be joint as defendant with his co-tenant who has erected or created a nuisance upon the estate unless he has actually participated therein.³ But tenants in possession may be jointly sued for injuries committed by cattle kept by them in common upon the premises, although the cattle are owned by them separately.⁴

¹ *Green v. Liter*, 8 Cr. (U. S.) 229; *Mastem v. Gibbs, Sprague* (U. S. C. C.) 158.

² *Lewis v. Marshall*, 8 Pet. (U. S.) 474.

³ *Simpson v. Seavey*, 8 Me. 138.

⁴ In *Gayle v. Johnston*, 80 Ala. 395 it was held that at common law a tenant in common is not liable to his co-tenant for use and occupation, unless there is an actual eviction, or an agreement to pay rent; and the English statute (4th & 5th Anne) changing the rule,

having been enacted after the settlement of this country, is not of force with us.

For rents actually received one tenant in common is liable to account to his co-tenant; but when the rents were received from a tenant to whom necessary advances to make a crop were supplied, such advances and other necessary costs and expenses incurred, must be deducted from the gross amount received. *Jack v. Hudnall*, 25 Ohio St. 255.

CHAPTER XI.

BY TENANTS FOR YEARS

- SEC. 89. Generally.
- SEC. 90. Distinction between assignment and sub-lease, as regards liability of tenant or assignee.
- SEC. 91. Under-tenant not liable for breach of lessee's covenants, except.
- SEC. 92. Under-lease amounting to assignment, treated as sub-lease between the parties, when.
- SEC. 93. Sale of under-leases.
- SEC. 94. Liabilities of under-tenant to his lessor.
- SEC. 95. By tenants for less than years.

SECTION 98. **Generally.**—A tenant for years, who is not restrained from so doing by his lease, may under-let the whole or part of the estate demised to him for any term less than that for which he holds it, upon such terms and conditions, not inconsistent with his own lease, as he sees fit to impose.¹ Indeed, from the later authorities, there is no question but that he may practically sub-let the premises for the whole term, provided he retains a reversionary interest to himself for however short a period, and in some of the States, if he reserves rent to himself so as to prevent his lease from operating as an assignment, and the reservation of the reversion of one hour or even less, would be sufficient.²

¹ *Rex v. Wilson*, 5 M. & Ry. 157 n.; 1 Duer (N. Y. Superior Ct.) 585; 21 Vt. 52; 11 Barb. (N. Y.) 592; *Pike v. Eyre*, 9 C. B. 909; *Oxley v. James*, 13 M. & W. 209.

² In *Collamer v. Kelley*, 12 Iowa, 317, it was held that an instrument under which a lessee transfers the estate, but reserves an in-

creased rent, and with a covenant for the delivery of possession to himself, was a sub-lease. See also *Martin v. O'Connor*, 43 Barb. (N. Y.) 514. So in *Post v. Kearney*, 2 N. Y. 394, the assignee of a lessee demised the premises for the residue of the term, reserving the delivery of possession at the end

In an excellent English work ' the author says," By an under-lease a new and partial estate only is vested in the under lessee, a reversion being left in the lessor, the duration of which was immaterial, for it may be a year, or day, or an hour. If rent is reserved in the under-lease, it need not contain a power of distress, for such power is incident to every demise at common law. ' But as no privity exists between the under-lessee and the original lessor the covenants entered into between the latter and original lessee, though they be covenants which run with the land, as to pay rent, repair, &c., cannot affect either by way or right or liability, the under-lessee personally. ' The land, how-

of the term, and the intermediate possession in case the buildings were destroyed by fire, and it was held that such demise was a sub-lease and not an assignment; so where a lessee sub-let for the whole term, except one day, it was held a sub-lease. *Davis v. Morris*, 35 Barb. (N. Y.) 227. So when a right of re-entry for a breach of any condition is reserved, the person taking under the sub-lease is held in New York to be a sub-lessee and not an assignee, and the party given the sub-lease can re-enter for a breach of condition, although there is no reversion remaining in him. *People v. Robertson*, 39 Barb. (N. Y.) 9; *Linden v. Hepburn*, 3 Sandf. (N. Y. Superior Ct.) 668. In a Pennsylvania case it was held that when a lessee transfers the whole term, *reserving the rent to himself*, such transfer is an under-lease as between the parties, so far, at least, as to give the lessee an action of debt against the under-lessee or his assignee, for rent. *Adams v. Beach*, 1 Phila. (Penn.) 99; and such is the rule in England. In *Price v. Corrie*, 5 Bing. 24; *Poultney v. Holmes*, 1 Str. 405; *Smith v. Mapleback*, 1 T. R. 445, and numerous other English cases which will be referred to under the head of assignment, it operates as a lease and not as an assignment, at least for some purposes. This doctrine, however, is by no means admitted, and there is a long line of opposing cases that

will be referred to under the head of assignments. The weight of authority supports the rule that, in order to create a lease instead of an assignment, there must be a reservation of a reversion in the lessor, and that no form of instrument can dispense with this requisite. A mere reservation of rent, or a reservation of a right of re-entry for a breach of any of the conditions of the lease, will not change the legal relation of the parties. The cases cited from the New York reports, *Post v. Kearney*, 2 N. Y. 394, and *Martin v. O'Connor*, 43 Barb. 522, are in conflict with the doctrine of *Bedford v. Terhune*, 80 N. Y. 454, and are directly questioned and practically overruled by *Woodhull v. Rosenthal*, 61 N. Y. 382, and the doctrine previously stated, that where the whole term is made over by the lessee, although in the deed by which that is done the rent and power of the entry for non-payment are reserved to him, and not to the original lessor, this is an assignment and not an under-lease, and that the introduction of new covenants into the instrument does not change the legal effect of giving up the reversion. See *Bacon's Abr. Title Leases (I.)*, 3.

¹ *Platt on Leases*, p 101 *et seq.*

² *Lit. § 218 Co. Litt.; 141 b; Curtis v. Wheeler; 1 Moo. & Malk, 463.*

³ *Halford v. Hatch*, 1 Doug. 193; *Bremner v. Hill*, 2 Anstr. 413;

ever, is not discharged by the under-lease from the claims of the original lessor, who, notwithstanding the sub-demise, may proceed to distress or eviction, if the rent be in arrears, or a forfeiture is incurred by his lessee.¹ An assignment, on the other hand, transfers the whole interest of the lessee to the assignee, for, if the lessee retain the *smallest* reversionary interest, the instrument, though professing to be an assignment, will not operate otherwise than as an under-lease,² nor provided the whole interest be conveyed, will the essence of the deed as an assignment be destroyed; by its reserving a rent to the assignor, and a power of re-entry for non-payment,³ or by its assuming, by use of the word *demise*, or in any other respect, the character of a lease."⁴

SEC. 90. *Distinction between assignment and sub-lease, as regards liability of tenant or assignee.*—There is a wide distinction between an assignee of a lease, and a sub-tenant. The former becomes personally liable to the landlord for all the covenants and conditions imposed up-

Anonymous, Mo. 93, pl. 230; Earl of Derby v. Taylor, 1 East, 502; Sparks v. Smith, 2 Vern. 275; Pilkington v. Shaller, 2 id. 374; Wyatt v. Byron, 1 M. G. & Sc. 623.

¹ Arnslly v. Woodard 6 B. & C. 519.

² Earl of Derby v. Taylor, 1 East, 502.

³ Freeman v. Bateman, 2 B. & Ald. 163; Palmer v. Edwards, 1 Doug. 187 n; Fitzgerald v. O'Connell, 1 Jo. & La. Tou. Lr. Ct. 134; Pluck v. Digges, 5 Bligh N. S. 31; Walluston v. Hakewell, 3 M. & G. 297; Fawcett v. Hull, Alc. & Nap, 248; Rankin v. Newsom, 1 Huds. & Cro. 70; *contra*, and holding that where a rent is reserved it is a sub-lease and not an assignment, Poultney v. Holmes, 1 Stra. 405; Hogan v. Fitzgerald, 1 Huds. & B. 77 n; Price v. Corrie, 5 Bing. 24; Coyne v. Smith, Bat. 90 n; Pearson v. Reis, 8 Bing. 178; Walsh v. Feely, Jo. 413; Bedford v. Terhune, 30 N. Y. 563.

⁴ Hicks v. Downing, 1 Ld. Rayd.

99; 1 Salk. 13; Freeman v. Bateman, 2 Br. Ald. 163; Smith v. Mapleback, 1 T. R. 441. Even where an under-lease amounts to an assignment as to third persons it may, as between the parties, be treated as an under-lease, where that is necessary to carry into effect their obvious intentions. *In re Turner*, 11 Ir. Ch. 304. In *Pollock v. Stacy*, 9 Q. B. 1083, it was held that where a party entitled to a term in land, demises the land to another at a weekly rent for the whole of such term, and it is the intention of the two to create the relation of landlord and tenant, use and occupation may be brought for the whole of such term, although the lessee has given a week's notice to quit before the expiration of the term, and has quit accordingly. Such demise will not be deemed an assignment against the intention of the parties, though nothing be left in the party demising. See also *Baker v. Gostling*, 1 Bing. N. C. 19; *Williams v. Haywood*, 1 El. & El. 1040.

on the lessee by the lease which runs with the land,' while the latter is liable only to the lessee, who is alone responsible to the landlord for the performance of the conditions of the lease, unless, by mutual agreement, the landlord has accepted the sub-tenant as his tenant in place of the lessee.'

SEC. 91. Under-tenant not liable for breach of lessee's covenants, except.—An under tenant is not liable for the breach of any condition of the lease under which his lessor holds, unless express stipulations to that effect are incorporated into the lease from the original tenant to him.'

¹ *Spencer's Case*, 5 Coke, 16 a; *Cally v. Wells*, 3 Wils. 25, and this is so although the word "assigns" is not used in the lease. *Bonner v. Smith*, 15 N. J. Eq. 51. A covenant for the renewal of a lease, *Roe v. Hayley*, 12 East, 469; for further assurance or quiet enjoyment, *Middlemore v. Goodale, Bro. Car.* 508; *Heath v. Whidden*, 24 Me. 883; *Campbell v. Lewis*, 5 B. & Ald. 392; *Markland v. Crump*, 1 Dev. & B. (N. C.) L. 9; *Martin v. Baker*, 5 Blackf. (Ind.) 232; *Spencer v. Bayes*, 8 Ves. 370, to supply houses with water, *Guardian v. Wilson*, 4 B. & Ald. 267; to insure houses against fire, when the money is to be laid out in rebuilding, *Vernon v. Smith*, 5 B. & Ald. 1, are all covenants running with the land for the breach of which the assignee may sue or be sued, as the case may be. It is not sufficient, however, that a covenant concerns land, but in order to annex it to, so as to make it run with the land, there must be a privity of estate between the contracting parties, *Webb v. Russell*, 8 T. R. 402, per LORD KENYON, C. J., and if they are merely collateral to the grantor's interest in the land, they do not run with it. *Mitchell v. Warner*, 5 Conn. 497; *Wheelock v. Thayer*, 16 Pick. (Mass.) 68; *Cremer v. Marshall*, 18 N. I. Eq. 837; *Swasey v. Crooks*, 30 Vt. 692; *Hasker v. Storer*, 8 Me. 228; *Brady v. Spurch*, 27 Ill. 478. A covenant not to sell marl from adjoining land, *Bremer v. Marshall*, ante: to grade and improve lands sold or leased for a pub-

lic square, the work to be done in a reasonable time, *Stuyvesant v. Mayor, &c.*, 11 Paige Ch. (N. Y.) 414, or covenants for rent repairs, that are only with the landlord or his assigns, will not bind the assignee of a mortgagee, *Webb v. Russell*, 8 T. R. 398; upon the same principle where an estate was conveyed to a trustee in fee to the use of such persons as A should appoint, and in default of appointment, to A, in fee, and A covenanted in the same conveyance for himself, his heirs, and assigns to pay a certain fee from rent reserved out of the estate, to the vendors, their heirs and assigns, it was held that the lands were not bound in the hands of A's appointee, by the covenant of A, *for the appointee did not take the estate of A, to which his covenant was annexed, but took as if the original conveyance had been made to him.* *Roach v. Wadham*, 6 East, 289. A covenant cannot run with a rent. *Milnes v. Branch*, 5 M. & S. 411.

² *Halford v. Hatch*, 1 Doug. 188; *Wyatt v. Byron*, 1 M. G. & Sc. 623; *Sparkes v. Smith*, 2 Vim. 275; *Pilkington v. Shaller*, 2 id. 374; *Austin v. Thomas*, 45 N. H. 113; *Fulton v. Stewart*, 2 Ohio 215.

³ *Berney v. Moore*, 2 Ridg. P. C. 323; but he may be evicted by the landlord, and in the absence of fraud, he has no remedy against his lessor. *Spencer v. Murreatt*, 4 B. & C. 457; *Hayward v. Parks*, 16 B. C. 217. So the original lessor may have him restrained, by in-

It is simply obligatory upon him to perform the conditions of the lease under which he holds, leaving his lessor to perform the conditions of his lease; consequently a lessee granting an under-lease, if he desires to have his tenant liable for the non-performance of the covenants of his lease from the landlord, should incorporate similar covenants in the under-lease, or provide for indemnity against any breach, otherwise he will be remediless.¹ But, if the under-tenant assumes performance of the lessee's covenants, or if he binds himself to indemnify the lessee against any breach, he will be liable to the lessee not only for the principal recovered of him by his landlord, but also for his reasonable costs and expenses incurred in a suit brought against him for the recovery of damages for such breach,² and such is also the rule where there is an implied contract to indemnify.³ If the covenants of the under-tenant are not identical with those contained in the lease to the lessee, he cannot be made chargeable for the amount that the landlord recovered of the lessee but only for the actual damage resulting from his breach. In an English case⁴ this doctrine was well illustrated. In that case A leased premises to B from 25th of March, 1823, for sixteen years wanting ten days, and he covenanted with A to keep the premises in repair, and to paint *once in every five years* of his term, and to leave the premises in repair. B under-leased the premises to C from the 24th of June, 1834, for four years and three quarters, wanting eleven days, and C covenanted with B to keep the premises in repair (the covenant so far being the same as in the original lease) *and to paint once during the term, and leave the*

junction, from violating the conditions of the original lease. *Clement v. Welles*, L. R. 1 Eq. Cas. 200; *Parkman v. Aicardi*, 34 Ala. 393.
¹ *Walker v. Hatton*, 10 M. & W. 249; *Penley v. Watts*, 7 id. 601. By the foregoing cases, *Neale v. Wylie*, 8 B. & C. 533, in which a different doctrine was held, was declared not to be law. *PARKE, B.*, in *Penley v. Watts*, 7 M. & W. 607 says: "The only contract of a

sub-lease is to perform the covenant in his sub-lease."

² *Hayden v. Cabot*, 17 Mass. 169; *Bonney v. Seely*, 2 Wend. (N. Y.) 481.

³ *Appleton v. Bascom*, 3 Met. (Mass.) 169; *Gibbs v. Bryant*, 1 Pick. (Mass.) 118; *Wynn v. Brooke*, 5 Rawle (Penn.) 106.

⁴ *Penley v. Watts*, 7 M. & W. 601; *Colley v. Streeton*, 2 B. & C. 273.

premises in repair. A sued B for breaches of this covenant, and the damages were assessed at £64 10s., being the amount of dilapidations established upon the hearing. B afterwards sued C for the amount of the dilapidations and the costs of the action brought against him by A, and claimed to recover in all the sum of £76, being the amount of the judgment recovered against him and his reasonable expenses incurred therein. The jury found the amount of the dilapidations to be 57 pounds 10s., and the court held the plaintiff was not entitled to recover also the costs of the former action, because the covenant of the defendant to the plaintiff and of the plaintiff to landlord were not *ad idem* either in substance or term.¹ The under-lessee cannot resist the payment of the rent to the lessee upon the ground that the latter has not paid his rent to the landlord, unless there is an express stipulation in the under-lease that payment of the rent shall be conditional upon payment having been first made to the landlord, or that he may pay it to the landlord, and the rule is the same, even though non-payment of the rent to the landlord works a forfeiture of the term.²

SEC. 92. Under-lease amounting to assignment, treated as sub-lease between the parties, when.—An under-lease for years made by a lessee for years, to commence immediately after his death, is valid provided he dies before his term has expired. Thus, a lessee for a term of ten years, may grant an under-lease for nine years to commence after his death, and the lease will be good for so many of the nine years as are unexpired at the time of his death. Where a lessee has power to renew his term upon giving six months' notice of his intention before its expiration,

¹ See opinion of PARKE, B. at p. 609. It is not sufficient that the under-tenant enters into similar covenants copied *verbatim* from the original lease (except as to names), although this is frequently done by those who know no better. *Logan v. Hall*, 4 C. B. 598; *Clow v. Brogden*, 2 M. & G. 39; but it should contain an ex-

press covenant by the under-lessee to observe and perform all the covenants and conditions in the original lease, except those which he is not to perform. *Woodfall's L. & T.* 216.

² *Gregson v. Harrison*, 2 T. R. 425; *Haycroft v. Criddle*, 82 Beav. 477.

and upon his preparing a fresh lease, &c., he cannot by merely giving notice of his intention, demise the premises to another party for a period extending beyond the first term; he must also prepare such fresh lease and get it executed, or at least endeavor to get it executed.'

SEC. 93. **Sale of under-leases.**—A contract to sell a lease, is not satisfied by the conveyance of an under-lease,² for the under-lease might become void if the covenants and conditions in the original lease were not duly performed.³ But on the purchase of an under-lease it is not a valid objection to the title, that the under-lease may become forfeited by the non-performance of the covenants in the original lease.⁴ It is the duty of a person contracting for an under-lease to ascertain the provisions of the original lease,⁵ and a person who enters into an agreement for an under-lease without inquiring into the covenants of the original lease, has constructive notice of all *usual* covenants in the original lease,⁶ but, whether he would be affected with constructive notice of *unusual* covenants or not is doubtful. If he informs the lessee at the time of entering into the agreement of the uses to which he intends to devote the premises, and he does not apprise him that there is a covenant prohibiting such use, the silence of the lessee is taken to be equivalent to an assurance that there is no such prohibitory covenant.⁷ So also a purchaser of leasehold property is bound to inform himself of the contents of the lease, and cannot avoid

Woodfall's L. & T. 216; Mackay v. Mackreth, 4 Doug. 213.

² Blake v. Phinn, 3 C. B. 976; Darlington v. Hamilton, Kay, 550; Modeley v. Booth, 2 De. G. & Sm. 718.

³ Muston v. Gladwin, 6 Q. B. 953; Logan v. Hall, 4 C. B. 598.

⁴ Hayford v. Criddle, 22 Beav. 477.

⁵ Casser v. Collings, 3 My. & K. 288.

⁶ Flight v. Barton, 3 My. & K. 282; Clements v. Welles, L. R. 1 Eq. Car. 200.

⁷ Flight v. Barton, ante. See also Van v. Corpe, 3 My. & K. 269,

where it was held that in an agreement for the lease of a house to be granted it was stipulated that the lease should contain the usual covenants between landlord and tenant, and that the house should not be used as a school, it was held that it was immaterial whether the plaintiff had or had not notice that the lessors derived their title under a lease from another person, because the agreement amounted to a representation on the part of the lessors that they were at liberty to grant a lease conformably to the agreement.

specific performance on the ground that the covenants are unusual, and were not mentioned in the particulars of sale.¹

SEC. 94. *Liability of under-tenant to his lessor.*—An under-tenant may deduct from the rent due to his lessor, compulsory payments made to the original landlord due from the original lessor for which his goods are liable to be distrained,² and it is not necessary that he should wait until his goods are actually distrained, nor is it any the less compulsory, because the landlord has given him time in which to pay,³ nor is it necessary that the original landlord should have threatened to distrain. It is enough that payment has been demanded and that the right to distrain exists.⁴ The principle upon which the doctrine of these cases rests is, that the immediate landlord is bound to protect his tenant from all paramount claims; and when, therefore, the tenant is compelled, in order to protect himself in the enjoyment of the land in respect of which his rent is payable, to make payments which ought, as between himself and the landlord, to have been made by the latter, he is considered as having been authorized by the landlord so to apply his rent, already due or accruing due.⁵ All such payments, even if incapable of being treated as payments of rent, would clearly give the tenant a right of action against his landlord as for money paid for his use, and so form a legitimate subject of set-off in an action of debt for the rent, and, in actions where a set-off is not allowed, the courts have given the tenant the benefit of a set-off as to payments of this description, by holding them to be, in fact, payments of the rent itself, or part of it.⁶

SEC. 95. *By tenants for less than years.*—All tenants, ex-

¹ *Grosvenor v. Green*, 28. L. J. Ch. 173; *Wilson v. Hart*, L. R. 1 Ch. App. 463.

² *Carter v. Carter*, 5 Bing. 406; *Sturges v. Farrington*, 4 Taunt. 614; *Sapsford v. Fletcher*, 4 T. R. 511.

³ *Carter v. Carter*, ante.

⁴ *Smith's L. & T.* 171. *BEST*, C. J., in *Carter v. Carter*, ante, said: "A payment made under such circumstances is no more voluntary than a donation to a beggar who presents a pistol."

⁵ *Carter v. Carter*, ante; *Taylor v. Zamina*, 6 Taunt. 529.

cept tenants at will or by sufferance, have a right, unless restrained by the provisions of the lease under which they hold, to create a sub-tenancy as incident to his tenancy, and his landlord's consent thereto is not necessary unless the lease so provides.¹ A tenant for a half year, a quarter, a month, or a week, any time however brief, may grant his interest or any part of it to another. A tenant from month to month or for a year, may assign his term, or any part of it, for any period less than the duration of his own term, but he cannot grant an interest exceeding his own either in point of duration or mode of occupancy. If, however, he grants a term in excess of his own, or for a use other than that authorized, it will be valid for such unexpired term as he has, and for a use consistent with the terms of his lease.² If he underlets from year to year, the sub-tenancy will take effect during his own term, and he has a sufficient reversion to enable him to distrain for rent in those States where a distress is permitted.³

¹ *Carter v. Carter*, ante; *Dyer v. Bowley*, 2 Bing. 94; *Sapsford v. Fletcher*, 47 R. 511; *Taylor v. Zamina*, 6 Taunt. 524; *Whitmore v. Walker*, 211 & K. 615; *Johnson v. Jones*, 9 Ad. & El. 809; *Stubbs v. Parsons*, 3 B. & Ald. 520. Money paid by a tenant for the landlord's share of property tax, *Gabell v. Shevill*, 5 Taunt. 81; *Fuller v. Abbott*, 4 id. 105; *Tinckler v. Prentice*, 4 id. 549, may be deducted from the rent next accruing, *Denby v. Moore*, 1 B. & Ald. 129; and must be so deducted or the right to recover it is lost. *Cumming v. Bedborough*, 15 M. & W. 438; *Denby v. Moore*, 1 B. & Ald. 129; *Bramston v. Robins*, 4 Bing. 11; *Stubbs v. Parsons*, 3 B. & Ald. 520; *Andrew v. Hancock*, 1 B. & B. 37; *Waller v. Andrews*, 3 M. & W. 312; *Saunderson v. Hauson*, 3 C. & P. 314. Sewer rates, water taxes, &c., &c., *Smith v. Humble*, 15 C. B. 321, when made a lien upon the land, or the right of distress therefor is given by Statute (id.); payment of an annuity or legacy secured by power

of distress, *Taylor v. Zamina*, 6 Taunt. 524; *Whitmore v. Walker*, 2 C. & K. 615; interest due on a mortgage made before the tenancy began, *Johnson v. Jones*, 9 Ad. & El. 809; *Dyer v. Bowley*, 2 Bing. 94, are treated as payments of rent, but the payment of interest on a mortgage or other claims that cannot be enforced by distress, are only treated as payments of so much rent, when made with the assent of the landlord, express or implied. *Dyer v. Bowley*, ante.

² In *Rex v. Aldborough*, 1 East, 598, a residence under a sub-lease, without the consent of the original landlord, was held sufficient to create the occupant a tenant so as to acquire a settlement, the court holding that it was too clear for argument that the law gives a tenant the right to sub-let, unless restrained by the lease.

³ *Mackay v. Mackreth*, 4 Doug. 213; *Onley v. Jones*, 13 M. & W. 209.

⁴ *Pike v. Eyre*, 9 B. & C. 909; *Curtis v. Wheeler*, Moo. & M. 493; *Cole on Ejectment*, 442.

CHAPTER XII.

BY CORPORATIONS.

SEC. 96. By Corporations generally.

SECTION 96. By Corporations generally.—All corporations, capable of taking and holding real estate by the common law, possess the power of making leases thereof,¹ and this applies to ecclesiastical,² eleemosynary,³

¹Smith v. Barrett, 1 Sid. 161. By the common law a corporation may take and hold property, real or personal, so far as may be necessary to carry into execution the powers conferred upon it, Blanchard's, &c. Co. v. Warner, 1 Blatch. (U. S. C. C.) 258; and the same power to grant property as an individual, and in the same capacity. Barry v. Merchants' Ex. Bank, 1 Sanford Ch. (N. Y.) 28, it may purchase and hold lands, and as a necessary incident may convey the same by lease or in fee. Nicoll v. N. Y. &c. R. R. Co. 12 N. Y. 121; Rives v. Dudley, 3 Jones (N. C.) L. 126. So it may take by devise, Downing v. Marshall, 23 N. Y. 366; American Bible Society v. Marshall, 15 Ohio St. 537, or by disseizin, Rehoboth v. Rehoboth, 23 Pick. (Mass.) 189; Robin v. Sedgwick, 35 Barb. (N. Y.) 315; and a religious or charitable corporation may hold lands in trust for pious or charitable uses, Philip's Academy v. King, 12 Mass. 546, but not for purposes foreign to the object of its formation. Jackson v. Hartwell, 8 John. (N. Y.) 422.

²Co. Litt. 44 a; Atty. Genl. v. Moses, 2 Madd. 308; 2 Blackstone's Com. 318; Spendlome v. Burkit, Hob. 7; Anonymous, 1 Dyer, 69 a. pl. 30; Bunny v. Wright. 1 Leon, 59. The statute, 32 Hen. 8, c. 28,

empowered all persons seized of any estate of inheritance in right of their churches (parsons and vicars excepted), to grant leases of their church lands, for a term not exceeding 21 years, or three lives, at the most. This statute did not change the common-law right of the persons enabled or abridge their capacity to lease, Bunny v. Wright, ante; and as these powers were mischievously exercised, and were productive of much hardship, several restraining statutes were passed, the most notable of which, and the only one necessary for us to notice, was that of 1 Eliz. c. 19, s. 5, subsequently extended by 13 Eliz. c. 10, s. 3; 14 Eliz. c. 14, and 18 Eliz. c. 11, the last three of which are to be read together as forming one statute, Vivian v. Blomberg, 3 Bing. N. C. 311, and 43 Eliz. c. 9, s. 8, which provided that all judgments should be void, the intent of which was to enjoy any lease contrary to the provisions of the previous statutes where a land or covenant for the same purpose would be void. These restraining acts have been followed in this country, and in some of the States provision is made by statute for the mode in which such corporations shall sell their lands in fee.

³Co. Litt. 47 a; 1 Platt on Leases, 238.

municipal,' or other civil corporations,' or corporations aggregate.' Formerly corporations could only make a disposition of their property under seal,' or through an agent or attorney appointed by an instrument under seal.* But the inconvenience of this doctrine, in view of the large increase in corporations, and the variety and extent of the business in which they are engaged, has rendered the abrogation of this rule a paramount necessity, and now it is held that a corporation may contract by parol or in writing in the same manner as an individual may, as to all matters within the scope of their authority,' and this, too, whether the contract relates to personal property or real estate,' and it is bound by the acts of its officers or agents within the scope of their authority, and within the scope of its corporate powers, whether they are appointed by deed or by parol,' and are subject to all the implied assumpsits and liabilities that an individual would

¹Smith v. Barrett, 1 Sid. 161; Bush v. Whitney, 1 Chip. (Vt.) 369; Taylor v. Carondelet, 22 Mo. 105; St. Louis v. Morton, 6 id. 476; Poole v. Bentley, 12 East, 168; Grant on Corporations, 146; Gowzer v. Grantham, 3 Russ. 261; Atty. Genl. v. Gore, Barnard Ch. 261; Graham v. Carondelet, 33 Mo. 262; Matthews v. Mayor, &c., 14 Abb. Pr. (N. Y.) 209; Dubuque v. Miller, 11 Iowa, 558; New Orleans v. Guillotte, 14 La. An. 875; Cincinnati v. Buckingham, 10 Ohio, 257; Peck v. Austin, 22 Tex. 261. In New York city, under the charter, the common council have authority to take a lease of property for the benefit of the city, and to determine what property shall be leased, and for what period, and it is held that this power is not limited to such leases as are provided for by appropriation. People v. Green, 64 N. Y. 499.

²Co. Litt. 47 a; Rex v. V. C. of Cambridge, 3 Burr. 1656; Parkinson's Case, Carth. 93.

³The Mayor, &c. v. Lawton, 1 Ves. & B. 226; People v. Union Ins. Co. 15 John. 383; Abby v. Billings, 85 Miss. 618, and a lease made by it through its proper officers is valid, although no vote authorizing it was taken. Bank of Middlebury

v. R. & W. R. R. Co., 30 Vt. 159; and they may also take leases of property. Jesus College v. Gibbs, 1 Y. & C. Exchq. 145.

⁴Rochester v. Pierce, 1 Camp. 466; Rex v. Chipping-Norton, 5 East, 239, 1 Kyd on Corporations, 263; Bridge Co. v. Sids., 2 C. & P. 371; Wood v. Tate, 2 N. R. 247; Canterbury v. Wood, Esp. 1 198; Carter v. Ely, 7 Sim. 211; Bird v. Higginson, 6 Ad. & El. 284; Canal Co. v. Wilmut, 9 East, 360.

⁵Kyd on Corporations, 270; Bank of England v. Chambers, 4 Ad. & El. 410.

⁶Danforth v. Scoharie Turnpike Co. 12 John. (N. Y.) 227; Chestnut Hill & Co. v. Rutter, 4 S. & K. (Penn.) 16; Rumford v. Wood, 12 Mass. 199; Union Bank v. Ridgely, 1 H. & G. (Md.) 324; Bank of U. S. v. Dandridge, 12 Wheat. (U. S.) 64; Mott v. Hicks 1 Cow. (N. Y.) 513.

⁷Legrand v. Sidney College, 5 Munf. (Va.) 324; The Banks v. Poitoux, 3 Rand. (Va.) 136; Chesapeake, &c. Canal Co. v. Knapp, 9 Pet. (U. S.) 541; Bank of Columbia v. Patterson, 7 Cr. (U. S.) 299.

⁸Buckner v. Briggs, 30 Mo. 452; Merrick v. Burlington, &c. Co., 11 Iowa, 74.

be, under the same contracts, and, 'even though an officer or agent acts in excess of his powers, yet the corporation is liable for his acts if it expressly or impliedly ratifies them,' but, in order to bring a contract made by an officer or agent within this rule, it must be one which, in the first instance, could have been legally entered into by the corporate authorities, and the proper parties to ratify such acts, are those only who could, in the first instance, have lawfully made the contract. But, if authority to do the particular act rests in a board of three or more persons, the ratification must be by a majority of the board, and individual members thereof, constituting less than a majority, is not sufficient. The 'power to acquire real estate necessarily carries with it the power to lease or mortgage it. These powers are implied, as necessary incidents of the right to acquire real estate, unless there are statutory restrictions thereon. The estate and interest of a corporation in real property, whether a mere easement, or a right of possession or title in fee, is the subject of mortgage lease or sale as property, and is distinguishable from the incorporeal franchise of the corporation,' and may be used by the lessee or grantee for any of the purposes to which the corporation itself could devote it.' A lease by parol, made by a corporation through its proper officers or agents, is valid whenever a parol lease would be valid if made by an individual; 'and a written lease under its corporate seal is not necessary to give validity to a lease, except in those cases where it would be required to be under seal if made by a natural person,' and even where an officer or agent

*The Board of Education v. Greenham, 39 Ill. 609; Roes v. Madison, 1 Ind. 281; Petrie v. Wright, 14 Miss. 647; Pittsburgh, &c. Co. v. Woolley, 12 Bush. (Ky.) 451.

²Aurora, &c. Society v. Paddock, 80 Ill. 263; Pittsburgh, &c. R. R. Co. v. Woolley, 12 Bush. (Ky.) 451.

³Taymouth v. Kochler, 34 Mich. 22.

⁴Aurora, &c. Co. v. Paddock, 80 Ill. 263; Evangelical, &c. Home v.

Buffalo Hydraulic Assn., 64 N. Y. 563.

⁵Evangelical, &c. Home v. Buffalo Hydraulic Association, 64 N. Y. 563; Goodrich v. Burbank, 12 Allen (Mass.) 459; Griffin v. Spencer, 6 Hill (N. Y.) 525.

⁶Evangelical, &c. Hem v. Buffalo Hydraulic Association, ante.

⁷Jackson v. Campbell, 5 Wend. (N. Y.) 572; Lowe v. L. & N. R. R. Co., 11 Q. B. 633.

⁸United States Bank v. Dand-

signs his own name and affixes his own seal to a contract or lease entered into by him on behalf of the corporation, yet the seal will be treated as simply nugatory, and the contract will be binding upon the corporation as a simple contract,¹ and where a lease is executed by the president of a corporation, and he is described therein as the party of the second part, and recites that the parties thereto have set their hands and seal, and the name of the corporation is signed against the seal and the words "by G. A. B., president," are signed underneath, it may be shown that the company *intended* to make the lease, and upon such proof it will be treated as its lease.² And even where a lease entered into by a corporation is voidable merely, and not void, it may be set up as a lease by proof that it has accepted rent under it, without proving that any lease executed in writing or under seal was made by it, as payment and receipt of rent is as much evidence of a demise, from year to year or otherwise, against a corporation, as it is against an individual, and the presumption arising from such payment and acceptance,

ridge, 12 Wheat. (U. S.) 168. A private corporation, unless otherwise provided in its charter or by general law, in the use and disposition of its property, the exercise of its powers and the transaction of its business, stands upon the same footing as an individual, and is subject to the same control and liabilities, and possesses the same rights, powers and privileges that an individual possesses, within the scope of its express or incidental powers. *Richmond &c. R. R. Co. v. Richmond*, 26 Gratt. (Va.) 83.

¹ *Regents, &c. v. District, &c. Soc.*, 12 Mich. 188. In Vermont, private corporations may convey lands by the deed of their president, and such deed may be sealed with his private seal. *Warner v. Mower*, 11 Vt. 385; and in Indiana it is held that unless the charter requires it, the acts of a corporation need not be evidenced by its corporate seal. *Hamilton v. Newcastle R. R. Co.*, 9 Ind. 359. In Maine it is held that it is not necessary for an agent executing a sealed instru-

ment for a corporation to use the corporate seal. *Porter v. Androscoggin R. R. Co.*, 37 Me. 349; and in Kentucky, it is held that a scrawl affixed to the name of a person executing a contract for a corporation must be taken as the seal of the corporation. *Reynolds v. Glasgow Academy*, 6 Dana (Ky.) 37. But in Florida a contrary rule is held, and seals employed by agents, not in fact a corporate seal, are not sufficient to make the instrument a specialty, but the instrument is held effectual as a simple contract. *Mitchell v. Land Co.* 4 Fla. 200. In Massachusetts an instrument purporting to be a mortgage, and signed by the president by his own name, and sealed with his own seal, is not invalid as a mortgage of the corporation if so intended. *Sherman v. Fitch*, 98 Mass. 57.

² *North Western Distilling Co. v. Brant*, 69 Ill. 158. In *Sherman v. Fitch*, 98 Mass. 57, a chattel mortgage was held valid, although signed by the president in his own name and sealed with his own seal.

is not inconsistent with the rule that, generally, a corporation can contract by deed only. It is merely a presumption raised against a corporation from its acts, that it has contracted in such a manner as to be binding upon it, whether a deed is required or not, and the burden is upon it to show that no lease, binding upon it, or which it could ratify by its acts, was made.¹ Thus, in an action of ejectment upon a demise by a corporation, it appeared from the defendant's admissions that the defendant had taken the land by permission of a servant of the corporation, and that another servant of it had given him notice to deliver up possession. No lease was produced, nor was it shown that any had been made, nor was it shown that the servant giving the plaintiff permission to occupy the premises had ever been appointed as agent of the corporation by instrument under seal. The judge instructed the jury that they were at liberty to find for the plaintiff if they thought the servants were authorized by the corporation to act for it, and LORD DENMAN, C.J., in delivering the opinion of the court in Queen's Bench, said: "The jury were at liberty to infer any possible valid authority, and we cannot assume that a canal company may not be incorporated by private act of parliament and may not be empowered thereby to appoint an agent without an instrument under seal." Not only may a corporation recover for the occupancy of lands leased by it by parol,² but it is also liable on a parol lease made to it, whenever such parol lease would be valid against an individual, at least, where it has entered into

¹ Pennington v. Taniere, 18 L. J. Q. B. 49.

² Birmingham Canal Co. v. Bold, 11 Q. B. 129; Rex v. Bigg, 3 P. Wms. 419.

³ Rochester v. Pierce, 1 Camp. 466; The Mayor of Stafford v. Till, 4 Bing. 75. "If," said BEST, C. J., in the case last cited, "a promise could not be implied, an action for use and occupation could never be brought by a corporation. But the law will not only imply a promise, but an existing tenancy in those who hold the lands of a corpora-

tion." In Wood v. Tate, 2 N. R. 247, the court said that the plaintiff having enjoyed the premises, they would consider him as tenant from year to year. See also Vinen's Abr. tit. Corporations (K.) 11, 41. If a lease under seal has been made, an implied promise cannot be raised, for a contract or authority implied by law, cannot be under seal. See a very important case upon the effect of an occupancy under a parol lease by a corporation. Finlay v. Bristol, &c. R. R. Co., 7 Exchq. 409.

possession under it.¹ It may recover in an action for use and occupation,² and a recovery may be had against it in that form of action,³ and the requisite promise or contract to sustain the action is implied by law.⁴ In the English cases previously cited, the court seems to entertain a doubt whether a corporation can be made liable upon a parol lease, *except to the extent of its actual occupancy under it*, but, as the question has always arisen in actions for *use and occupation*, which, under the statute 11 Geo. 2, c. 19, authorizing such actions, only lie against a person who has "*held or occupied*" the lands for the use of which the action is brought, so that the real question as to whether a corporation holding over under a parol lease does not become a tenant from year to year, and therefore liable for a full year's rent, although it quits before the year has expired, is left undecided. In any event, as the only ground intimated by the court upon which an opposite doctrine can be predicated, is, that a corporation cannot contract except by deed or the method provided by statute, these cases, upon this point, cannot be regarded as authority in this country, because, by our courts, it is held that a corporation may bind itself by contracts relating either to real or personal property, by parol or simple contracts, unless its charter or the statute otherwise provides,⁵ so that it is safe to say that it is the conceded rule in this country that a corporation may make a lease by parol, whenever an individual can do so, or may become liable upon a parol lease to the same extent as an individual would be, and, by holding over, may become a tenant from year to year, thereby incurring all the liabilities, and enjoying all the rights incident to that relation.⁶ And, even though a corporation had

¹ *Finlay v. Bristol & Exeter Railway Co.* 7 Exchq. 409; *Beverly v. The Lincoln Gas Co.* 6 M. & W. 815.

² *Mayor, &c. v. Till*, 4 Bing. 75; *Rochester v. Pierce* 1 Camp, 486.

³ *Lowe v. L. & N. R. R. Co.* 11 Q. B. 936; *Finlay v. Bristol &c. R. R. Co.* ante.

⁴ *Hall v. Mayor of Swansea*, 5 Q. B. 526; *Lord Campbell, C. J.*, in

Lowe v. L. & N. R. R. Co. ante.

⁵ *Legrand v. Sidney College*, 5 Munf. (Va.) 324; *Merrick v. Burlington*.

⁶ *Legrand v. Sidney College*, ante. *The Banks v. Poitiaux*, 3 Rand. (Va.) 136. In *Blunt v. Walker* 11 Wis. 334, the court say: It is well settled, sound and rational law, that any contracts which a corpor-

no authority to make a lease of its lands, a person who has occupied under a lease from it, and has had the benefits thereof, will not, in an action upon it, be permitted to question the validity of the lease or the authority of the corporation to make it.¹ A corporation can neither taken or grant lands except by its corporate name, but a minute, or immaterial variation, when the identity of the grantor or grantee may be fixed from the name used, either from the instrument itself or from the savements or proofs, is not material and will not avoid a grant.²

ation has power to make, *may be made in the same manner that a natural person could make them, in the absence of any restrictions.*" Smith v. Morse, 2 Cal. 524. It is true that they possess only *jura minorum*, and have not in all respects and on all subjects, the power of contracting like persons of full age and *sui juris*. But, except to the extent that they are restricted by their charter, either expressly or by necessary implication, or by statute, they may contract in the same manner as an individual might, and are subject to the same liabilities and possess the same rights. Seibrecht v. New Orleans, 12 La. An. 496. But where the charter designates the mode in which it shall act, it must conform to that mode. Talmage v. N. A. Coal Co., 3 Head. (Tenn.) 337. But it may, by usage, render themselves liable on instrument executed in a different mode. Witte v. Derby Fishing Co., 2 Conn. 260. But a party dealing with a corporation, has a right to presume in the absence of notice to the contrary, that it is acting within the scope of its corporate power. Aiken v. Blanchard, 32 Barb. (N. Y.) 527; Conn. &c. Ins. Co. v. Cleaveland, 41 Barb. (N. Y.) 9. But see Merritt v. Lambert, 1 Hoff. Ch. (N. Y.) 166, where it was held that one dealing directly with a corporation for the purchase of real estate, to be conveyed by it, is taken to have constructive notice of the extent of its corporate powers *as to such estate*.

¹ Argenti v. San Francisco, 16 Cal. 255.

² Mayor, &c. v. Blamire, 8 East, 487; 1 Kyd on Corporations, 234; People v. Runkle, 9 John. (N. Y.) 147; St. Louis Hospital v. Williams, 19 Mo. 609; Pendleton v. Bank of Kentucky, 1 Mon. (Ky.) 177; Inhabitants v. String, 9 N. J. L. 323; People v. Love, 19 Cal. 676; Douglass v. Branch Bank, 19 Ala. 659; Medway, &c. Co. v. Adams, 10 Mass. 360; Woolrich v. Forrest, 1 Penn. St. 115; Pierce v. Somersworth, 10 N. H. 379; Bowen v. State Bank, 5 Ark. 234; African Society v. Varick, 13 John. (N. Y.) 38; President, &c. v. Myers, 6 S. & K. (Penn.) 12; Milford, &c. Co. v. Brush, 10 Ohio, 111; Preachers' Aid Society, 45 Me. 552; Romeo v. Chapman, 2 Mich. 179; Insane Asylum v. Higgins, 15 Ill. 185; Trustees v. Peaselee, 15 N. H. 317; Vansant v. Roberts, 8 Md. 119; Porter v. Blakeley, 1 Root (Conn.) 440; Bodman v. American Tract Society, 9 Allen (Mass.) 447; Chapin v. School Dis., 45 Me. 552; Brittain v. Newland, 2 D. & B. (N. C.) 363. In Oxford's Case, 10 Coke, 53 b, it was held that the misnomer of a corporation in an act of parliament, *when the express intention appears* shall not avoid the act, and generally it may be said that the name of a corporation in grants or conveyances, need not be *idem syllabus seu verbis*, but that it is enough if it is *idem re et sensu*. See Burgess of Lynne, 10 Coke, 121 a, where numerous instances are given in which at a very early day this rule was applied. If the description in a statute or a will be certain, it is sufficient, although the name is not

Corporation aggregates "as dean and chapter," "mayor and common council," &c., &c., may make or confirm leases without expressing either the christian or surname of the dean, mayor, &c., because in their political capacity as a corporation aggregate, they always remain the same and are said to never die; but in leases or confirmations by a bishop, dean or other *sole* corporation, both the christian and surname should be given.¹

observed. Oxford's Case, ante; Ayroy's Case, 11 Coke, 21 b. In a will, if it sufficiently appears to be the intent of the testator to leave his land to a particular corporation, it is sufficient. Thus, a devise to the mayor, jurats and commonalty of Rye, by the name of The Worshipful, the Mayor, Jurats, and Council of the ancient town of Rye, was held good. Atty. Genl. v. The Mayor of Rye, 7 Taunt. 546; Vin. Arb. Corporations (G.); 4 Bacon's Abr. Corporations (C.) 2; Comyn's Digest, Capacity (B.) 5. If the name is expressed in *synonymous* terms, it is enough. Thus a lease made by the name of Minister Pauperi's Domus Die, when the true name is Minister Die Pauperis, it is good because the same design is specified by both names. Pitt v. James, Hob. 124. An immaterial addition to the name does not destroy the lease or grant. In Dr. Ayrag's Case, 11 Coke, 18 b. it was held that if a person be otherwise described with certainty in a grant, the misprision of his baptismal name is immaterial. As, if in grant by The Master, &c. of the Mystery of Cooks, they are named "of the craft or mystery." Croft v. Howel,

Plowd. 537 b. So if the president and scholars of Corpus Christi College in Oxford make a lease by their name, with the addition "in the County of Oxford," the lease is good. Dumper v. Syms, Cro. Eliz. 816. So a lease made by "The Dean and Chapter *ecclesiæ cathedralis Christi de Oxonia*," by the name of "Dean and Chapter *ecclesiæ*, &c. *academiæ de Oxon*," is good. Lord North's Case, Moore, 361. See also Doe v. Miller, 1 B. & Ald. 699; Marriatt v. Paschal's Case, 1 Leon, 159. As to immaterial variances, see Willis v. Jermaine's Case, 2 Leon, 97; Cheney's Case; 1 id. 159; Cloydon Hospital v. Farley, 6 Taunt. 467; Master, &c. of Sussex, &c. College v. Davenport, 1 Wils. 284; Mayor, &c. of Carlisle v. Blamire, 8 East, 587. There is a distinction between a misnomer in a grant and a misnomer in a writ or declaration, but it is not expedient to pursue this matter further. As to the distinction intimated, see Tipling v. Pexal, 2 Bulst. 238; Mayor of Stafford v. Bolton, 1 B. & P. 40; Heading v. Mayor of London, Cro. Car. 574.

¹ Bacon's Abr. Tit. Leases (G.) 8; 2 Inst. 666.

CHAPTER XIII.

BY INFANTS.

SEC. 97. Generally.

SEC. 98. Lease must be personal act of the infant.

SEC. 99. Leases to infants.

SEC. 100. When infancy does not avoid lease or deed.

SEC. 101. Right of disaffirmance, and how exercised.

SEC. 102. How leases may be affirmed.

SECTION. 97. Generally.—Leases made by infants are not void, but voidable only, whether they contain a reservation of rent or not, or, in fact, whether they are advantageous or disadvantageous to him,¹ and the lessee, being an adult, cannot avoid the lease upon the ground of the lessee's infancy.² In some of the English cases the doctrine has been advanced, that a lease made by an infant, that is *advantageous to him* is not voidable even but is absolutely binding upon him and cannot be disaffirmed by him upon attaining majority,³ and this doc-

¹ Abbot v. Parsons, 3 Burr. 1806; Lane v. Cowper, Mo. 106; Slator v. Brady, 14 Ir. C. L. 61; Ketsey's Case, Cro. Jac. 820; Ashfield v. Ashfield, Plowd. 418; Slator v. Trimble, 14 Ir. C. L. 342; Dixon v. Merritt, 21 Minn. 196; Scranton v. Stewart, 52 Ind. 69; Illinois L. & L. Co. v. Bonner, 75 Ill. 815.

² Abbot v. Parsons, 3 Burr. 1806; Haw v. Ogle, 4 Taunt. 10; Forester's Case, 1 Sid. 42; Farneham v. Atkins, 1 Sid. 446; Davies v. Mannington, 2 Sid. 109; Abbot v. Parsons, ante; Shannon v. Bradstreet, 1 Sch. & Lef. 58. In Smith v. Bowin, 1 Mod. 25, the plaintiff brought an action to recover for grass which he had sold to the defendant and for six pounds due him for other matters, and which the defendant agreed to pay him for at a certain price, and also to pay him six pounds that he owed him. The defendant cut the grass, but he set up in defence to the action that the plaintiff was an infant, and so not

bound by the contract, and, because the contract was not reciprocal, insisted that he ought not to be bound. KELYNCKE said: "If an infant let you a house, shall he not have an action against you for the rent?" and TWISDEN said: "I have known an action upon the case brought by an infant upon a promise to pay so much money in consideration that he permit the defendant to enjoy such a house. It was long insisted upon, that this was not a good consideration, because not reciprocal; for the infant might avoid his promise if an action were grounded upon it against him; but it was adjudged to be a good consideration, and that the action was maintainable," and in the principal case the plaintiff had judgment. See 2 Dancier's Abr. 770; Beeson v. Carlton, 18 Ind. 854.

³ Baker v. White, 2 T. R. 159; Drury v. Drury, 5 Bro. P. C. 570; Ketsey's Case, Cro. Jac. 820.

trine is also advanced by very able text writers,¹ but this does not seem to be the English doctrine, and its validity is denied by high authority² and is not sustained by the better class of authorities,³ and MR. PLATT says: "But notwithstanding MR. JUSTICE BULLER's remarks⁴ it seems to be the prevailing opinion of the profession *that an infant is never precluded from disputing a lease upon attaining the age of twenty-one.*" An opinion," he adds, "that is fortified by the fact of the lessee's inability to avoid the lease in any case on account of the infancy of the lessor and the inadmissibility of the infant's plea of *non est factum*. Notwithstanding a passage to the contrary in Coke,⁵ it appears that an infant's lease for life or lives, made by feoffment and personal livery of seizin, whether containing a reservation of rent or not, or beneficial or disadvantageous to him, is voidable only."⁶ But, whatever may be the rule in England, there seems to be no question that, in this country an infant may, upon attaining the age of majority, disaffirm any conveyance of his own lands, whether by deed or lease, and whether beneficial or otherwise, and that he cannot during his infancy make any conveyance that will be binding upon him when he becomes of age.⁷ The rule established by

¹ Woodfall's L. & T. (9 English Edn.) p. 41. See also Addison on Contracts, 83.

² 2 Preston on Conveyancing, 248; 1 Platt on Leases, 31. Co. Litt. 380 b; 2 Inst. 673; Abbot v. Parsons, 3 Burr. 1801.

³ Abbot v. Parsons, ante.

⁴ 1 Platt on Leases, 31.

⁵ Referring to the latter's remarks in White v. Maddon, 2 T. R. 161.

⁶ And he cites 2 Preston on Conveyancing, 249.

⁷ Co. Litt. 273 a; but see Lit. § 547; Co. Litt. 45 b, 308 a.

⁸ Lane v. Cowper, Mo. 105; Abbot v. Parsons, 3 Burr. 1801.

⁹ Dearborn v. Eastman, 4 N. H. 441; Roof v. Stafford, 7 Cow. (N. Y.) 179; Gillet v. Stanley, 1 Hill (N. Y.) 121; Bool v. Mix, 17 Wend. (N. Y.) 119; Harrod v. Myers, 21 Ark. 592; Roberts v. Wiggin, 1 N. H. 73; Irvine v. Irvine, 9 Wall. (U. S.) 917; Bozeman v. Browning, 31

Ark. 364; Cummings v. Powell, 8 Tex. 80. The consent of an infant heir cannot be made the ground of any order which may prejudice his rights. Thus, the consent of an infant heir that an outstanding mortgage on a farm devised by the testator to his wife might be paid out of the personal estate, or that the widow should have the use of a certain sum of money during her pleasure, is not binding, nor does it relieve the executor from accounting for the money. Scott v. Monell, 1 Redf. (N. Y.) Surrogate 431. See also Rogers v. Conger, 7 John. (N. Y.) 557. Nor are they bound by acts of their guardian that are illegal, not even if he acted under a special act of the Legislature, if it had no power to authorize him to do the act. DeWitt v. Lockwood, 3 Blatch. (U. S. C. C.) 56; Tillinghast v. Holbrook, 7 R. I. 230.

our courts is that a deed, lease, or other conveyance made by an infant that takes effect upon delivery is not void, but merely voidable, without reference to the question of benefit¹ and mortgages,² and even bonds for a title to lands come within the rule.³ The words "takes effect" are a material part of the definition, because unless the instrument conveys a present interest it is void⁴ and excludes a letter of attorney, or a deed or lease that delegates a mere power or naked authority.⁵ But the deed of an infant *feme covert*, is held to be void,⁶ but this rule would probably be ignored in those States where the disabilities of *feme coverts* as to lands held by them to their own use have been removed.⁷

¹ Chapman v. Chapman, 13 Ind. 396; Jenkins v. Jenkins, 12 Iowa, 15; Wallace v. Lewis, 4 Har. (Del.) 75; Love v. Gest, 5 Har. & J. (Md.) 106; Kendall v. Lawrence, 22 Pick. (Mass.) 540; Bool v. Mix, 17 Wend. (N. Y.) 119; Whitney v. Dutch, 14 Mass. 462; Ferguson v. Bell, 17 Mo. 347; Cummings v. Powell, 8 Tex. 80; Bigelow v. Kinney, 3 Vt. 853; Wheaton v. East, 5 Yerg. (Tenn.) 41; Cook v. Toombs, 36 Miss. 685; Phillips v. Green, 5 T. B. Mon. (Ky.) 344; Oliver v. Handlett, 18 Mass. 457; Jackson v. Ladd, 6 John. (N. Y.) 257; Jackson v. Whitcomb, 1 John. Cas. (N. Y.) 513; and Abbot v. Parsons, 8 Burr. 1801, and Slaton v. Brady, 14 Ir. C. L. Ex. 61, and Slaton v. Trimble, 14 Ib. Q. B. are to the same effect. The rule as held by our courts is, that all deeds or instruments under the seal executed by an infant, are voidable only, except those which delegate a naked authority, and that *they* are void. That is, that all instruments which do not take effect by delivery of his hand are void, and such as take effect by delivery, are simply voidable. Roof v. Stafford, 7 Cow. (N. Y.) 179; Conrac v. Birdsall, 1 John. Cas. (N. Y.) 127; Roberts v. Wiggin, 1 N. H. 73; Whitney v. Dutch, 14 Mass. 462; Lawrence v. McArter, 10 Ohio, 37; 4 Bacon's Abr. Tit. Leases (B.); Baylis v. Dinely, 3 M. & S. 477; 2 Preston on Conveyancing, 248; Abbot v. Parsons, 8 Burr. 1801.

² Palmer v. Miller, 25 Barb. (N. Y.) 399; Roberts v. Wiggin, 1 N. H. 73; State v. Plaisted, 45 N. H. 412.

³ Mustard v. Wahlford, 15 Gratt. (Va.) 329; Weaver v. Jones, 24 Ala. 420; Parsons v. Hill, 8 Mo. 185.

⁴ Abbot v. Parsons, 8 Burr. 1801; Gillett v. Stanley, 1 Hill (N. Y.) 121; Bool v. Mix, 17 Wend. (N. Y.) 119; Worcester Bank v. Eaton, 15 Mass. 371; Phillips v. Green, 5 T. B. Mon. (Ky.) 344.

⁵ Lawrence v. McArter, 10 Ohio 87; Colcock v. Ferguson, 3 Dessau (S. C.) 482.

⁶ Mackey v. Proctor, 12 B. Mon. (Ky.) 433; Chandler v. McKinney, 6 Mich. 217; Magee v. Welsh, 18 Col. 155; Cronise v. Clark, 4 Md. Ch. 408; Schrader v. Decker, 9 Penn. St. 14. And it seems that an infant *husband* who joins with his wife in the conveyance of her land, may disaffirm the deed when he becomes of age. Barker v. Wilson, 4 Heisk. (Tenn.) 268.

⁷ See Scott v. Buchanan, 11 Humph. (Tenn.) 468; Francis v. Wiggell, 1 Modd. 261; Sanford v. McLean, 8 Paige Ch. (N. Y.) 117; Bool v. Mix, 17 Wend. (N. Y.) 119; Doe v. Dyre, 3 C. B. 557. In Miles v. Lingerian, 24 Ind. 885, the court proceeded upon the ground that her deed was merely voidable when she joined with her husband in making it and where an infant *feme covert* joined with her husband in a deed to a railroad company of land belonging to her, and ten years afterwards, and after improvements had

SEC. 98. **Lease must be personal act of the infant.**—The mere receipt of rent by an executor of an infant does not bind him. An infant cannot appoint an agent, and therefore his next friend, although his natural guardian, cannot bind him.¹ In order to be good, the lease of an infant must be his own personal act, and a lease made by an agent is not binding upon him,² because an infant's appointment of an agent or attorney is wholly void.* "If," said PARKE, B., in the case in note 2, "an infant appoints a person to make a lease for him it does not bind the infant, neither does his ratification bind him. * * The lease of an infant, to be good, must be his own personal act."

SEC. 99. **Leases to Infants.**—Leases made to an infant are not void, but merely voidable, 'and if upon attaining majority he disaffirms the lease, he is not liable for rent,' but if, upon attaining majority, he continues to occupy the premises, and does not signify his dissent to the case, within a reasonable time, he becomes liable for all the rent remaining unpaid up to the time of action brought, including that which accrued during his majority, and debt will lie against him therefor, 'and he becomes

been made upon the land, and it had been conveyed to a third person, it was held that she might disaffirm the deed, and that in order to do so, she was not obliged to tender back the purchase money received therefor. See post. In Arkansas it is held that the provision of the statute that a married woman may convey real estate by deed executed by herself and husband, does not prevent her from disability to convey real estate when under age; and a deed executed under those circumstances may be cancelled upon application by her to the Court of Chancery so far as it affects her interest, but is good to convey the husband's interest, such as the right of rents and profits and the tenancy by curtesy in case he survives her. Harrod v. Myers, 21 Ark. 592.

¹ Keeler v. Fassett, 21 Vt. 539.

² Thomas v. Roberts, 16 M. & W.

778; Trueblood v. Trueblood, 8 Ind. 195.

³ Bennett v. Davis, 6 Cow. (N. Y.) 393; Roof v. Stafford, 7 id. 179; Whitney v. Dutch, 14 Mass. 457; Fonda v. Van Horne, 15 Wend. (N. Y.) 681; Waples v. Hastings, 3 Harr. (Del.) 403; Cool v. Mix, 17 Wend. (N. Y.) 12.

⁴ Baxter v. Bush, 29 Vt. 465; Griffith v. Schwendeman, 27 Mo. 412.

⁵ Ketsey's Case, Cro. Jac. 320.

⁶ Ketsey's Case, ante; Henry v. Root, 33 N. Y. 526. In Bacon's Abr. (F.) 586, the author says: "If an infant takes a lease for years, rendering rent, if he enter upon the lands he shall be charged with an action of debt during his minority, because the purchase is intended for his benefit; but he may waive the term and not enter, and if more rent be reserved than the land is worth, he may

liable to perform all the other obligations attached to the estate.¹ An infant, even in the case of a lease that is disadvantageous to him, cannot protect himself under the plea of infancy if he has taken possession and not disclaimed upon attaining his majority, unless he is still a minor. He cannot retain the estate and keep the owner from dealing with it as his own, without being liable to bear all the burdens attached to it.² Possibly such would be the rule if the lease can be said to come under the head of *necessaries*,³ but this latter point may be doubtful, and possibly no state of circumstances could exist which would be said to bring it under that head, so as to make him liable upon the lease during his minority.⁴

SEC. 100. When infancy does not avoid lease or deed.—An infant is bound by leases made by him in a corporate capacity,⁵ or when the lease or deed does not affect his interest, but from an authority which he is trusted to exercise for another, as a lease made by him as trustee, executor, or in any other representative capacity,⁶ or

avoid it." But this is not the rule as now held, and there is no doubt but that infancy would be a complete bar to an action of debt or covenant for rent, whether the lease was beneficial to the infant or not, unless after becoming of age, he ratified the lease. See cases cited in previous note, also *Ketsey's Case*, ante.

¹ *Holmes v. Blogg*, 8 Taunt. 35.

² *PARKE, B.*, in *Railway Co. v. M'Michael*, 5 Exchq. 128.

³ *Lowe v. Griffith*, 1 Scott, 458. The Supreme Court of Connecticut, in a case before it, *Munson v. Washband*, 31 Conn. 803, took a very sensible view of the question as to what may be regarded as necessities. In that case the wife, who was an infant, employed the plaintiff to bring an action for her against the defendant for a breach of promise of marriage, which was finally compromised by their marriage. The plaintiff brought his action against the defendant for counsel fees, costs, &c., in that suit, and the action was resisted upon the ground that the wife was an infant when she employed the

plaintiff, and, his services not being necessities, within the rule, no recovery could be had. But the court repudiated the idea that the liability of an infant for necessities only extends to board, lodging, clothing, &c., and said: "In cases where, under peculiar circumstances a civil suit is the only means by which an infant can procure the absolute necessities which he requires, it would be a reproach to the law to deny him the power to make the necessary contracts for its commencement and prosecution." So it would seem reasonable to hold in certain cases, that a lease of lands which supply a home or the necessities of life for an infant, might be treated as coming under the head of necessities when the fruits of the lease are the infant's main reliance for support.

⁴ In *Tupper v. Caldwell*, 12 Met. (Mass.) 559.

⁵ *Case of Duchy of Lancaster*, Dyer 207 b; Bac. Abr. tit. Agr. pl. 80; Woodfall's L. & T. 41.

⁶ LORD MANSFIELD, in *Abbot v. Parsons*, 8 Burr. 1802. "A power,

when the act is one which the law would have compelled him to do,¹ or where he, having it in his power to do so, refuses to restore the benefits he derived from his contract.²

SEC. 101. Right of disaffirmance, and how exercised.—As previously stated, an infant may disaffirm his deed, lease or bond for title *after* he becomes of age, but he cannot do it before,³ but if he dies before he becomes of age, his heirs or executors may disaffirm it.⁴

tays the court, in *Sheldon v. New-ion*, 3 Ohio St. 493, "may be irrevocably executed by an infant, as by an adult." In *Prouty v. Edgar*, 6 Iowa, 358, a minor held lands in trust for a person who had given bonds for its conveyance, and the infant conveyed the premises accordingly. It was held by the court that he could not set up infancy to defeat the deed, because, although an infant, he might have been compelled to convey, and therefore his conveyance *without* legal compulsion was good.

¹ *Abbot v. Parsons*, ante; *Pigot v. Russell*, Cro. Eliz. 124; *Kilcrease v. Shelby*, 23 Miss. 161; *Barrington v. Clarke*, 2 Penn. 115; *Jones v. Brewer*, 1 Pick. (Mass.) 314.

² *Weed v. Beebe*, 21 Vt. 495; *Young v. McKee*, 13 Mich. 552; *Thompson v. Linscott*, 2 Me. 186; *Dana v. Coombs*, 6 id. 89; *Robbins v. Eaton*, 10 N. H. 561; *Jones v. Phoenix Bank*, 8 N. Y. 228.

³ *Slator v. Trimble*, 14 Ir. C. L. 342; *Woodfall's L. & T.* 41; *Fawcett's L. & T.* 4; 8 *Bacon's Abr. tit. Infancy (A.)*; *Pitcher v. Lycock*, 7 Ind. 398; *Tucker v. Moreland*, 10 Pet. (U. S.) 58; *Peterson v. Laik*, 24 Mo. 541; *McGan v. Marshal*, 7 Humph. (Tenn.) 121; *Jackson v. Carpenter*, 11 John. (N. Y.) 539; *Cressinger v. Welch*, 15 Ohio, 156; *Hoyle v. Stowe*, 2 Dev. & B. (N. C.) L. 320. In *Shipman v. Horton*, 17 Conn. 482, *WILLIAMS, C. J.*, says: "In case of a deed of land by an infant, it seems to be settled that the conveyance cannot be avoided until the infant becomes of age." But the rule is different as to personal property and

he may disaffirm, either before or after he becomes of age. *Shipman v. Horton*, ante; *Heath v. West*, 26 N. H. 191; *Carr v. Clough*, 26 id. 280; *Walker v. Ellis*, 12 Ill. 470. A contrary rule as to disaffirmance of personal contracts was held in *Roof v. Stafford*, 7 Cow. (N. Y.) 179, but it was reversed on appeal. See 9 *Cow. (N. Y.)* 626. *PARKE B.*, intimated in *Railway Co. v. McMichael*, 5 Exchq. 124, that an infant might possibly give notice of disaffirmance before he became of age, that would be operative, but the question was not before the court, and no decision exists to that effect. *MR. TAYLOR*, in his work on *Landlord & Tenant*, lays down the doctrine that "he may disavow or annul them, either before his majority, or within a reasonable time after it" (p. 60, sec. 93), but his statement is not sustained by any of the cases referred to by him, and the rule seems to be well established that an infant cannot make a deed or other conveyance of land, or any interest therein, void or valid by any act of his while under age. *McCormic v. Leggett*, 8 Jones (N. C.) L. 425. In *Dunton v. Brown*, 31 Mich. 182, the court held that *neither an infant nor his guardian have authority while the infancy continues*, to determine whether a voidable contract of the infant shall be affirmed or annulled, *but that it is wholly a matter for the infant himself to decide when he becomes of age.*

⁴ *Cruise*, 74, § 67; *Person v. Chase*, 37 Vt. 647; *Bozeman v. Browning*, 31 Ark. 364. In *Nelson v. Eaton*, 1 Redf. (N. Y. Surrogate)

The deed or lease of an infant conveying real estate may be avoided by an entry, suit or action, a subsequent conveyance, an effort to restore parties to their original condition, or any act unequivocally manifesting the intention. The institution of an action of ejectment to recover the possession of the land, is an act fully possessing this character.¹

An entry is not in all cases necessary, particularly

498, it was held that the contract of an infant may be avoided by those only, besides himself, who are privy in blood or estate." It being understood of course that the latter can avoid it only after the infant's decease, and as to the expression *privies in estate*, it must be confined wholly to those who inherit from him, or take under a title from his executor, and it cannot relate to a co-tenant, as privies in estate, as joint tenants, or privies in law, as lords by escheat cannot take the benefit of the infancy of another, *Whittingham's Case*, 8 Coke, 43 b. *It is only those who stand in his place*, who can set up infancy to avoid his deed, and they cannot do this under a plea *non est factum*, but must plead his infancy specially, and that plea avoids by relation back to the delivery. LORD MANSFIELD in *Abbot v. Parsons*, 3 Burr. 1805. Privies in blood, as used in this connection, relates only to privies in a land inheritable, and privies in estate are joint tenants, husband and wife, donor and donee, lessor and lessee, &c., and privies in law are those upon whom, without blood or privity of estate, the law casts the land or makes his entry lawful. Of these, privies in blood may take advantage of infancy. Privies in estate can only do so except possibly in some special cases, and privies in law can never do so, *Whittingham's Case*, ante. In *Person v. Chase*, 87 Vt. 647, as to personal property, it was held that a gift by the infant could be revoked or avoided by his administrator. See also *Tillinghast v. Holbrook*, 7 R. I. 230, where it was held that the administrator of an infant might avoid the act of the infant in parting with a note to the maker,

upon payment of it to him. See also *Vaughan v. Parr*, 20 Ark. 600, where it was held that an administrator might disaffirm a sale made by the infant before her death. An objection to a marriage settlement upon the ground that the parties were infants, can be made only by the parties themselves, *Jones v. Butler*, 80 Barb. (N. Y.) 641. The plea of the infancy of his testator by his executor to a note made by the testator, is good. *Hussey v. Jewett*, 9 Mass. 100; *Martin v. Mayo*, 10 id. 137. They may affirm or disaffirm the testator's contracts, deeds, leases, &c. *Jefford v. Ringgold*, 6 Ala. 544.

¹ *Drake v. Ramsey*, 5 Ohio, 251. He may disavow, in various ways, his intention of carrying into effect a contract made during infancy. He may enter upon lands leased, sold, or conveyed by him when under age, or may, when he comes of age, convey the same lands to another, *McGill v. Woodward*, 3 Brev. (S. C.) 401; by entry, *Worcester v. Eaton*, 13 Mass. 371, or by conveying to another. *Hoyle v. Stowe*, 2 Dev. & Bat. (N. C.) 320; *Tucker v. Moreland*, 10 Pet. (U. S.) 58; *Jackson v. Todd*, 6 John. (N. Y.) 657; *Pitcher v. Lycock*, 7 Ind. 398; *Peterson v. Laik*, 24 Mo. 541; *White v. Flora*, 2 Overt. (Tenn.) 426; *Jackson v. Carpenter*, 11 John. (N. Y.) 539; *Cressinger v. Welch*, 15 Ohio, 159; *Hoyle v. Stowe*, 2 Dev. & B. (N. C.) L. 320. But a conveyance made by an infant which the law would have compelled him to make cannot be disaffirmed after he becomes of age, and if he conveys the land to another after he becomes of age, the second deed will confer no title, *Elliott v. Horn*, 10 Ala. 348.

when the lands are not occupied,¹ but where the land is occupied under the prior lease or deed, he cannot avoid the conveyance without an entry upon the land or other act of equal notoriety² or by his grantee under the subsequent lease or deed.³ In Indiana a written notice of disaffirmance has been held sufficient.⁴

SEC. 102. **How lease may be affirmed.**—There is a well recognized distinction between the nature of acts which are necessary to *avoid* an infant's deed or lease, and those which are sufficient to confirm them. They cannot be avoided except by some act equally solemn with the instruments themselves. But acts insufficient to avoid may amount to a confirmation. Thus, he may confirm a lease made during his infancy by accepting rent thereon after he becomes of age,⁵ or by taking a lease of the same lands for a firm of which he is a member,⁶ or by mortgaging the property to the lessee or any other person, and referring to the lease therein,⁷ or, indeed, any distinct and positive act, or language that clearly recognizes the lease as a valid and binding instrument will give the validity to the lease. Thus, where upon attaining majority he said to his lessee, "God give you joy of your lease," it was held a sufficient affirmation thereof,⁸ and any verbal confirmation will be sufficient as an affirmation,⁹ but, no act done by an infant *before* he became of age can operate either to affirm or avoid a deed or lease made by him.¹⁰ The rule may be said to be, that an infant's deed can be ratified only after his coming of age, by some act for that express purpose, or by such a

¹ Jackson v. Carpenter, 11 John. (N. Y.) 575; Bool v. Mix, 17 Wend. (N. Y.) 119; Jackson v. Burchin, 14 John. (N. Y.) 124.

² Dominick v. Michael, 4 Sandf. (N. Y. Superior Ct.) 474; Roberts v. Wiggin, 1 N. H. 78. There must be an entry, ejectment, demand of possession, or the like, or at least notice that he disaffirms the lease. Slaton v. Brady, 14 Ir. C. L. 61.

³ Prout v. Wiley, 28 Mich. 164.

⁴ Scranton v. Stewart, 52 Ind. 69. See Slaton v. Brady, ante.

⁵ Smith v. Low, 1 Atk. 489; Ash-

field v. Ashfield, W. Jo. 157; Hamilton v. Cardross, 8 Bro. P. C. 359; Huth v. Carondelet Co. 56 Mo. 202; Thomas v. Pullis, 54 id. 211.

⁶ Irvine v. Irvine, 9 Wall. (U. S.) 617.

⁷ Story v. Johnson, 2 Yo. & Call. 587.

⁸ Leon, 4 pl. 13; 1 Platt on Leases, 32.

⁹ Houzer v. Reynolds, 1 Hayw. (N. C.) 143.

¹⁰ Philips v. Green, 3 A. K. Marsh. (Ky.) 7; Tucker v. Moreland, 10 Pet. (U. S.) 58.

course of conduct as necessarily excludes a contrary supposition.¹ It has been held that if a person while under age sells lands and conveys them by deed, a demand made by him upon the grantee, for the purchase-money, after he attains majority, is an affirmation of his deed, and he cannot afterwards disaffirm it.² So where he purchases real estate during his infancy, and gives a mortgage for the whole or a part of the purchase-money, if, after becoming of age, he retains possession of the land or conveys it to another, this amounts to a ratification of the mortgage,³ as an infant will not be permitted to keep the property, and at the same time, repudiate the contract of purchase.⁴ *But if the infant has parted with the property, the retention of the fruits of it after he becomes of age will not amount to an affirmation of the contract.*⁵

¹ Williams v. Mabee, 7 N. J. Eq. 500; Brady v. McKenney, 23 Me. 517; Emmons v. Murray, 16 N. H. 385; Levering v. Heighe, 2 Md. Ch. 81; Kline v. Beebe, 6 Conn. 494; Wheaton v. East, 5 Yerg. (Tenn.) 41; Wimberly v. Jones, 1 Ga. Dec. 91; Hartman v. Kendall, 4 Ind. 403. Slight acts may or may not operate as an affirmation, but it would seem that the act must be such as would operate as a fraud upon the other party, unless it was intended as a confirmation. Rainsford v. Rhinsford, 1 Spears Ch. (S. C.) 385, and his act must have been done with full knowledge that it would be void except for such confirmation. Curtis v. Patton, 11 S. & R. (Penn.) 805; Baker v. Kennett, 54 Mo. 88; Gallatin v. Cummingham, 8 Cow. (N. Y.) 361; Norris v. Vance, 3 Rich. (S. C.) 164; Hinley v. Margaritz, 3 Penn. St. 428. Thus when an administrator sold lands belonging to an infant, but the deed was not made until she became of age, and she was present when the deed was executed, but took no part in the transaction, and did not sign the deed, nor in fact know that the administrator had not authority to bind her thereby, it was held that she was not thereby estopped from setting up her title to the land, and that her acts could not be said to amount to a ratification. Davison v. Young, 38 Ill. 145. Where an

infant borrowed money and gave a mortgage upon his land for security, and, after attaining majority, made a will by which he directed that all his just debts should be paid, it was held that this was sufficient to enable the court to infer an affirmation of the mortgage. Merchants' F. Ins. Co. v. Grant, 2 Edw. Ch. (N. Y.) 544.

² Bank of Louisiana v. Dilery, 2 La. An. 648.

³ Boston Bank v. Chamberlain, 15 Mass. 220; Lynde v. Budd, 2 Paige Ch. (N. Y.) 191; Hubbard v. Cummings, 1 Me. 11; Young v. McKee, 13 Mich. 552; Weed v. Beebe, 21 Vt. 495; Curtis v. McDougal, 26 Ohio St. 66; Wood v. Gosling, 1 N. Y. Leg. Obs. 74; Robbins v. Eaton, 10 N. H. 561; Dana v. Coombs, 6 Me. 89.

⁴ Kitchen v. Lee, 11 Paige Ch. (N. Y.) 707; Cecil v. Salisbury, 2 Vern. 324; Kline v. Beebe, 6 Conn. 494.

⁵ In Walsh v. Powers, 43 N. Y. 23; 3 Am. Rep. 654, the defendant, while an infant, purchased certain mortgaged real estate, and in the deed to her covenanted to pay the mortgage. She sold the property at an advanced price. Several years after she became of age the mortgage was foreclosed, and she was made a party therein, and a judgment for a deficiency was obtained against her grantor. In an

So keeping possession of lands or goods after attaining majority, will be treated as an affirmation of the deed, lease or contract,¹ as he will not be permitted to retain the property, and repudiate the contract under which he holds it.² But where an infant has made a lease of lands for a long term, and received a gross sum for the rent, he is not obliged to tender to the lessee a proportionate part of the rent for the unexpired term, as a condition precedent to his right to maintain an action at law to recover possession of the land, if he has not the money then in his possession. The rule does not apply when he has parted with the money or property before he attains majority.

Lapse of time may furnish evidence of acquiescence, and thus confirm the title, but of itself does not take away the right to avoid, until the Statute of Limitations takes effect,⁴ and his heirs, legal representatives, or those who have his estate, are entitled to the benefit of the same rule in this respect as the infant himself.⁵

action against her for a breach of her covenant to pay the mortgage, she set up her infancy at the time when the covenant was entered into in defence, and the court held that the covenant was voidable, and that neither the retention of the fruits of her sale, nor her appearance in the foreclosure suit, could be regarded as acts tending to ratify her obligation. See, however, *Flynn v. Powers*, 54 Barb. (N. Y.) 550, where it was held, under similar circumstances, that a neglect of an infant who had attained majority, who was made a party to foreclosure proceedings, to set up his infancy in defence, when the plea would have been efficacious, operated as an affirmation of the conveyance under which he assumed payment of the mortgage.

¹ *Henry v. Root*, 33 N. Y. 526; *Stern v. Freeman*, 4 Met. (Ky.) 309; *Lynde v. Budd*, 2 Paige Ch. (N. Y.) 191; *Bryden v. Bryden*, 9 Met. (Mass.) 519.

² *Stout v. Merrill*, 35 Iowa, 47; *Bozeman v. Browning*, 31 Ark. 364.

³ *Ditt v. Bowen*, 54 Ind. 204; *Bedinger v. Wharton*, 27 Gratt. (Va.) 857; *Walsh v. Powers*, 43 N. Y. 23; *Miles v. Lingerman*, 24 Ind. 385.

⁴ In *Drake v. Ramsay*, 5 Ohio, 251—a female infant executed a conveyance of a lot of land, afterward married, and she and her husband brought an action of ejectment to recover possession. It was held that since the Statute of Limitations did not yet operate, the plaintiffs possessed the right to disaffirm her deed unless they had extinguished that privilege by something amounting to a confirmation; and that this effect might follow either an express recognition of the validity of the deed, or from any act done under a knowledge of their rights, which demonstrated a willingness to be bound by the contract; or by continuing, after acquiring such knowledge, to enjoy any benefit, profit, or privilege, under the contract, after the infant had attained full age. *Wallace v. Latham*, 52 Miss. 291; *Bozeman v. Browning*, 31 Ark. 364. This rule, however, is subject to the qualification that the infant has done nothing in the meantime amounting to an equitable estoppel. *Prout v. Wiley*, 28 Mich. 164; *Thomas v. Pullis*, 54 Mo. 212.

⁵ *Illinois L. & L. Co. v. Bonner*, 75 Ill. 315.

There are a class of cases in which it has been held that an infant must disaffirm within a reasonable time after attaining majority, but it will be found that this rule applies only in the case of personal estate, or in those cases where the infant, after attaining majority, has stood by and seen the grantee or lessee making valuable improvements upon the property without intimating a purpose to disaffirm,¹ or that the term "reasonable time" is construed as embracing the whole period before the Statute of Limitations applies,² and mere acquiescence, or a bare recognition of it, on his part, without any intermediate or continued benefit, such as the possession of the property, or receiving rent for any period short of that limited by statute for acquiring possession, will not preclude him,³ nor will an admission of the fact that he made the deed or lease, after he becomes of age, amount to a recognition of it as a valid instrument so as to constitute an affirmance,⁴ nor will a declaration of affirmance signed by a person who claims to act as his solicitor *prima facie* bind him. It must be shown that the person so signing the declaration was in fact his solicitor, and had authority to bind him in that respect.⁵ In Iowa it was held that an infant who induces a person to buy lands of him upon representations made by him that he is of age, cannot, upon attaining majority, disaffirm the sale,⁶ but this doctrine is not generally held, nor is it consistent with principle. The party defrauded, in such a case, has his remedy in an action for the fraud, if any

¹ Vaughan v. Parr, 20 Ark. 600; Thompson v. Strickland, 52 Miss. 574. Where, after coming of age, with a knowledge of the facts, an infant manifests a clear intention to affirm a deed or lease, and for years stands by and sees the same greatly enhanced in value by improvements made thereon by others, he is thereby estopped from disavowing his affirmance. Higley v. Barrow, 49 Me. 108. Where, however, the person is ignorant of his rights, he cannot be estopped from setting up his title, although

he has seen the grantee or lessee making large improvements upon the premises. Spencer v. Carr, 45 N. Y. 406.

² Jones v. Butler, 30 Barb. (N. Y.) 641; Urban v. Grimes, 2 Grant's Cas. (Penn.) 96; Huth v. Carondelet R. R. Co., 54 Mo. 202.

³ Voorhies v. Voorhies, 24 Barb. (N. Y.) 124.

⁴ Jackson v. Burchin, 14 John. (N. Y.) 124.

⁵ Carroll v. Potter, 23 Mich. 377.

⁶ Prouty v. Edgar, 6 Iowa, 353.

exists, otherwise his misfortune is the penalty of neglecting to ascertain the facts.¹

In the case of a lease to an infant he cannot, upon attaining the age of majority, unreasonably delay in affirming or disaffirming it,² and as to what is a reasonable time, is essentially a question for the jury. And where, by the deed or lease of another of lands to which the infant has no title, he is given the privilege of taking the premises or not, at his election, upon the coming of age, he is bound to make his election within a reasonable time. Thus, in a case where the plaintiff's father had leased premises to the defendant during his (the lessor's) life at a yearly rent, the lease containing a provision that the lessor's son might take the house for himself when he became of age, if he chose to do so, a delay of nearly a year in signifying his intention to take the house was held unreasonable.³ "We do not mean to say," said the court, "that he was bound to elect the day after he became of age, but he should have done so in a reasonable time; otherwise one party would be at liberty to avoid the agreement at any time, while the other would be bound by it. If a year be not too much, why not a year and a half?" If within a week or a fortnight, that would be reasonable. But without drawing the precise line what shall be reasonable time, it is enough to say that the notice in this case was not given in reasonable time." Questions of this character will seldom arise in the case of leases at a yearly rent, because the assent or dissent of the lessor, will be signified either by receiving or refusing rent.

Where an infant occupies premises as lessee, he may affirm or disaffirm the lease upon arriving at full age;

¹ *Conrac v. Birdsall*, 1 John. Cas. (N. Y.) 127; *Calcock v. Ferguson*, 3 Dessau (S. C.) 482. In *Roo v. Foster*, 12 C. B. (N. S.) 272, a replication "on equitable grounds" to a plea of infancy, that the defendant fraudulently contracted the debt by means of false and fraudulent representations that he was of full age, was bad, and disclosed no answer in equity. In *Seabrook v. Gregg*, 2 S. C. 68, it was held that a court of equity will not refuse to allow an infant to avail himself of his infancy to set aside a deed or covenant, on the ground that his so doing is a fraud, unless the grantee or covenantee has been misled by some actual misrepresentation, or concealment.

² *Holmes v. Blogg*, 8 Taunt. 35.

³ *Bromfield v. Smith*, 2 T. R. 436.

but he is bound to do the one or the other within a reasonable time, and the rule adopted in the case last referred to, would apply in *such a case*. "If," says BACON,¹ "an infant takes a lease for years of lands, rendering rent which is in arrears for several years, then the infant comes of age, and still continues the occupation of the land; this makes the lease good and unavoidable, and, by consequence makes him chargeable with all the arrears incurred during his minority; for though at full age he might have departed from his bargain, and thereby have avoided payment of the arrears which the lessor suffered to accrue during his majority yet, *his continuance in possession after his full age*, ratifies and affirms the contract *ab initio*, and so gives a remedy for the arrears of rent incurred from the time of the contract made."²

¹ Bacon's Abr. tit. Infancy (I.) 8.

² Kittley v. Elliott, Rolle's Abr. 72; S. C. Cro. Jac. 320; Co. Litt. 2, 172, 308; 3 Comyn's Dig. 167; N.

Western R. R. Co. v. McMichael, 5 Exchq. 114; Kelly v. Coote, 5 Ir. C. L. 469; Holmes v. Blogg, 8 Taunt. 35.

CHAPTER XIV.

BY GUARDIANS.

- SEC. 103. Kinds of guardianship.
 SEC. 104. Guardian by nature—powers of.
 SEC. 105. By guardian by nurture.
 SEC. 106. By guardians in socage.
 SEC. 107. By a testamentary guardian.
 SEC. 108. By guardian by appointment.
 SEC. 109. Intruder treated as guardian.

SECTION 103. **Kinds of guardianship.**—There are several species or kinds of guardians, known to and recognized by the law, whose rights, powers and duties vary, according to the class to which they belong. These are : 1st, guardians by nature ; 2d, by nurture ; 3d, by socage ; 4th, testamentary guardians ; 5th, by appointment, or confirmation of a competent tribunal.

SEC. 104. **Guardian by nature—powers of.**—The father of a child is its natural guardian until it arrives at the age of twenty-one years, and unless the father appoints a testamentary guardian, upon his death, the mother becomes guardian by nature until it becomes of suitable age to choose a guardian for itself,¹ and the mother of a *bastard* child is its natural guardian until it becomes of full age.² This species of guardianship extends no fur-

¹ *Fields v. Low*, 2 Root (Conn.) 320 ; *Jarrett v. State*, 2 Gill & J. (Md.) 27 ; *Curtis v. Curtis*, 5 Gray (Mass.) 535 ; *Osborn v. Allen*, 26 N. J. L. 388.

² *Wright v. Wright*, 2 Mass. 109 ; *Robalina v. Armstrong*, 15 Barb. (N. Y.) 247 ; *Com. v. Fee*, 6 S. &

R. (Penn.) 255 ; *Matter of Dodge*, 1 Clark's Ch. (N. Y.) 184 ; *Hudson v. Hills*, 8 N. H. 417 ; *Carpenter v. Whitman*, 15 John. (N. Y.) 208 ; *People v. Landt*, 2 id. 375 ; upon the death of the mother, the putative father, if there be one, becomes entitled to its custody, *Com. v.*

ther than to the custody and control of the infant's person.' They have no binding control over his property, and cannot make a valid lease of his lands' unless it may be that possibly a lease at will would be good,' and a court of equity will in some cases confirm a lease made by him for a long time, if the wards, upon attaining majority, have been guilty of such *laches* or acts as would make it inequitable for them to repudiate it.'

SEC. 105. By guardians by nurture.—The father, or in case of his death without having appointed a testamentary guardian, the mother, is guardian by nurture, of minor children, whether male or female, until they are fourteen years of age, and is confined within the same limits, and possesses the same powers, as exist in the case of guardianship by nature, and, while it does not give the guardian control over the infant's property to the extent that they may dispose of it, yet it has been held that they may make a lease at will, of the infant's

Anderson, 1 Ashm. (Penn.) 55; Matter of Celina, 7 La. An. 162; and if he marries the mother, and recognizes the child as his own, he, by virtue of the marriage, becomes entitled to its custody and control, Adams v. Adams, 36 Ga. 236; and in some of the States, provision is made by statute, by which the putative father is given the custody of the child, Wright v. Burnett, 7 Ill. 587.

¹ Rex v. Thorpe, 5 Mod. 221; Rex v. Inhabitants, 8 B. & Ad. 714; Kendall v. Miller, 9 Cal. 591.

² May v. Caldin, 2 Mass. 55; Anderson v. Darby, 1 N. & M. (S. C.) 369; Rep. v. Cobb, 9 Yerg. (Tenn.) 463; Magruder v. Peter, 4 G. & J. (Md.) 323; Keeler v. Fassett, 21 Vt. 539.

³ Pigot v. Garnish, Cro. Eliz. 678, 784.

⁴ In Smith v. Low, 1 Atk. 489; the mother acting as guardian of her minor children, entered into a building lease for forty-one years, her eldest child, being about nineteen years old, joining with her in the lease, and they covenanted that the lessee should have quiet enjoyment, and that the rest of the

children, when of age, should confirm the lease. The children all arrived of age, and for about ten years after the youngest attained majority, they accepted the rents under the lease without intimating any objections thereto. They then brought ejectment against the lessee, who at once filed a bill in equity to have the lease established. The lease, under the circumstances detailed, was established, LORD HARDWICK saying: "It appears to be for a valuable consideration, rent reserved, and covenants for the lessee to leave it in good repair, and it is mentioned by the mother who acts as guardian, to be for the benefit of the infants; there is no fraud or collusion proved on the part of the lessee; and the husband of the lessor and the father of the children died in bad circumstances, unable to repair the premises, which were houses and a mill; therefore, the consideration of the lessee's repairing them is a beneficial one for the infants; and that is shown to be done; here is the great point, the acceptance of rent for so long a continuance, the youngest child having been of age

lands,¹ but the lease is void as to the infant *when he becomes* of age,² and the infant is not stopped from a recovery of the rent of the premises before he came of age, by its receipt by the father,³ and this is the case whether the father acts as guardian by nature or by nurture.

SEC. 106. By guardians in socage.—“Guardianship in Socage,” says MR. PLATT, in his work on Leases,⁴ is a consequence of tenure occurring only when a minor is entitled to a legal estate *by descent*, in lands holden by socage,⁵ and devolves, by the common law, upon the next of kin to whom the inheritance cannot descend.”⁶ The relation conveys more than a bare authority; it is also coupled with an interest in the land, and gives to the guardian, until the minor arrives at the age of fourteen,⁷ unless previously removed by the death of the father, who has appointed a testamentary guardian, full control over the land⁸ and they may lease, avow, or bring trespass in their own name.⁹ As previously stated, this guardianship so far ceases when the infant attains the age of fourteen, as to enable the infant to enter and take the land to himself; yet, if no other guardianship succeeds to, it continues until another guardian is appointed, or the minor becomes of full age.” Where there is no guardian in socage, the father is guardian by nature un-

ten years, and notice of the lease must be presumed. In this country it has been held that, even while a sale of premises by the father of a minor, the father being tenant by curtesy, is not binding upon the minor, yet he may ratify it upon attaining majority, and it is binding upon the father in any event. *Hall v. Jones*, 21 Md. 439.

¹ *Pigot v. Garnish*, Cro. Eliz. 678.

² *POPHAM J.* in *Pigot v. Garnish*, ante.

³ *Jackson v. Combs*, 7 Cow. (N. Y.) 38 Affd. 2 Wend. N. Y. 153; *Fonda v. Horne*, 15 Wend. 631.

⁴ *Platt on Leases*, 373.

⁵ *Quadring v. Downs*, 2 Mod. 176.

⁶ 2 *Blackstone's Com.*, 88 Litt. s 128; Co. Litt. 87 b.

⁷ *Riggs v. Bell*, 5 T. R. 471.

⁸ *Rex v. Oakley*, 10 East, 494; *Rex v. Sherrington*, 8 B. & Ad. 714; *Rex v. Manners*, 8 Ad. & El. 597. By Stat. 12, Car. 2, chap. 24, the father might appoint a testamentary guardian by will, and upon the father's death, the guardian so appointed by him superseded the guardian in socage.

⁹ *Truss v. Old*, 6 Rand. (Va.) 556; *Bryne v. Van Hoesen*, 5 John. (N. Y.) 66; *Shopland v. Rydler*, Cro. Jac. 55; *Dugar v. Norton*, 1 Freem. 102; *Shaw v. Shaw*, Vern. & Scriv. 607; *Bedell v. Constable*, Vaug. 182; *Wade v. Baker*, 1 Ld. Raym. 130; *Rex v. Oakley*, 10 East, 491; *Hill v. Saunders*, 4 B. & C. 536; *Rex v. Sutton*, 3 Ad. & El. 597.

¹⁰ *Bryne v. Van Hoesen*, ante.

til the minor becomes of age, but he has no control over the real or personal estates of the child,' and he cannot be guardian *in socage* at the common law, as such guardian must be one who cannot inherit from his ward.¹ The guardian *in socage* has the entire custody of, and control over, the land, and is entitled to have the rents and profits for the benefit of the heirs.² But his authority continues only while his guardianship exists; consequently, a lease made by him for a term extending beyond the period when the infant attains the age of fourteen, is voidable by the infant when he arrives at that age.³ The death of the infant determines the lease and so does the removal or death of the guardian *in socage*,⁴ and a Court of Chancery having control over the infant and the guardian *in socage* may set aside a lease made by him, if it appears to be improvident, collusive, or fraudulent.⁵

SEC. 107. By a testamentary guardian.—Under the Statute of 12 Car. 2c. 24, guardianship in chivalry was abolished, and nearly all tenures were converted into tenures *in socage*, and empowered the father of any child under the age of twenty-one years, and not married at the time of his death, to appoint by deed or will, executed in the presence of two or more persons, a guardian of such minor child or children, to have the custody and tuition of them until they respectively arrived at the age of twenty-one years. The same act also empowered such guardians to take the custody and control of all the property, real and personal, belonging to his wards, and to manage the same for their use and benefit during their minority, and

¹ Combs v. Jackson, 2 Wend. (N. Y.) 158; Genet v. Tallmadge, 1 John. (N. Y.) 8; Fonda v. Van Horne, 15 Wend. (N. Y.) 681.

² Graham v. Houghtaling, 30 N. J. L. 552; Jackson v. Combs, ante. But by statute in N. Y. the father may now be guardian *in socage*; Holmes v. Seeley, 17 Wend. (N. Y.) 71.

³ Bryne v. Van Hoesen, ante; Beecher v. Crouse, 19 Wend. (N. Y.) 306; Osborn v. Carden, Plowd.

298; Willis v. Whitewood, 1 Leon. 322; Hod. 105; Brisden v. Hussey, Roll. Abr. Garde (Q.) pl. 4.

⁴ Osborn v. Carden, Plowd. 298; Bedell v. Constable, Vaughn, 182; Wade v. Baker, 1 Ld. Raym. 180; Rex v. Sutton, 8 Ad. & El. 597.

⁵ Balder v. Blackburn, Browl. 79.

⁶ People v. Wilcox, 22 Barb. (N. Y.) 178; Matter of Andrews, 1 John. Ch. (N. Y.) 99.

to bring all such actions relating thereto as by law a guardian in socage might do. This statute enabled the father, who could not himself be guardian in socage, to supersede such guardian's powers, by appointing a guardian for them by deed or will.

A testamentary guardian possesses the same powers as a guardian in socage, and may lease the lands of his wards in the same manner and subject to the same limitations as a guardian in socage might.¹

SEC. 108. By guardian by appointment.—By the common law, guardianship by socage ceased when the infant attained the age of fourteen, when, in the absence of a testamentary guardian, he might elect some person to act as guardian for him during the remainder of his minority,² and such guardian possessed the same powers, in all respects, as a guardian in socage.³ In most, if not in all the States, this right of election on the part of an infant upon attaining the age of fourteen, is given by statute, and the tribunal having authority under the statute to appoint guardians, is required to confirm such elections, by appointing the person elected by the infant as guardian, unless the person chosen is, for some cause, incapable of acting. It is not, however, practicable to enter into details as to the mode of appointing guardians, as that matter, as well as their powers and duties is largely regulated by statute in the several States. It is sufficient to say that a general guardian possesses no greater control over the lands of his wards than a guardian in socage, and he cannot make a lease of his ward's lands that will be effectual beyond the period during which his guardianship exists.⁴ But a guardian appointed by a Court of Chancery occupying virtually the position of a receiver, has no power to lease without the sanction of the court,⁵ nor can

¹ *Bedell v. Constable*, Vaughn, 179; *Parry v. Hodgson*, 2 Wils. 129; *Shaw v. Shaw*, Vern. & Scriv. 606.

² *Co. Litt.* 87 *b*; *Blackstone's Com.* 462; 1 *Platt on Leases*, 379.

³ *Bacon on Leases*, p. 132.

⁴ *Ross v. Gill*, 1 Wash. (Va.) 8; *Bacon v. Taylor*, Kirby (Conn.) 398;

Putnam v. Ritchie, 6 Paige Ch. (N. Y.) 390; *Huff v. Walker*, 1 Ind. 193; *Field v. Schiefflin*, 7 John. Ch. (N. Y.) 150; *Snook v. Sutton*, 10 N. J. L. 133; *Graham v. Chataque Bank*; 5 B. Mon. (Ky.) 45.

⁵ *Rex v. Sutton*, 3 Ad. & El. 597; *Macpherson on Infancy*, 106.

the court at common law authorize a lease to be made extending beyond the period of that infancy, which will be binding upon him when he attains majority; and in case such a lease is made, it will be voidable as to the infant when he becomes of age,¹ but, if upon attaining majority, he accepts rents accruing under the lease after he becomes of age, he will be estopped from denying the validity of the lease,² as he must either ratify the lease *in toto*, or abandon all rights under it.³ Where, however, an estate is vested in trustees for the use of an infant, a court of equity may authorize them to lease it for a term of years.⁴ In Illinois, by statute, a guardian cannot himself occupy the lands of his ward, but must lease them upon such terms and for such length of time as the county court directs.⁵ If a lease is made by a guardian in the name of his ward, as if the authority was derived from him, it has been held that it will be absolutely void as to the infant, because he cannot appoint an agent, and he cannot affirm it when he comes of age,⁶ although a lease made by a guardian, as such, extending beyond the term of infancy, may be ratified by the ward when he attains majority, yet in such a case, in order to solve all questions in this respect, it is better to have the infant join with his guardian in the lease.⁷ All guardians, except guardians in socage, are mere tenants at will of the infant's estate, and consequently cannot make a valid lease for a term; yet, if such a lease is made, the lessee cannot avoid it by setting up want of authority in the guardian to make it.⁸

¹ Bacon on Leases, 133; Bacon's Abr. Leases (I.) 9. In England under the Stat. 11 Geo. 4 & 1 W. 4 c. 65, power was given to the court to authorize the making of leases of the estate of infants, extending beyond their infancy, and similar authority is conferred by statute in some of the States of this country.

² Smith v. Low, 1 Atk. 489.

³ Overbach v. Heermance, Hopk. Ch. (N. Y.) 337; Kitchen v. Lee, 11 Paige Ch. (N. Y.) 107; Lynde v. Budd, 2 id. 191.

⁴ Hedges v. Ricker, 5 John Ch. (N. Y.) 163.

⁵ Muller v. Brumer, 69 Ill. 108.

⁶ Bacon on Leases, 138; Bacon's Abr. tit. Leases (I.) 9; Combe's Case, 9 Coke, 76 b; Trueblood v. Trueblood, 8 Ind. 195; Bennett v. Davis, 6 Cow. (N. Y.) 398; Thomas v. Roberts, 16 M. & W. 778; Bool v. Mix, 17 Wend. (N. Y.) 120; Waples v. Hastings, 3 Harr. (Del.) 403; Whitney v. Dutch, 15 Mass. 457.

⁷ 1 Platt on Leases, 381.

⁸ Shipworth v. Green, 8 Mod. 312; Bacon's Abr. tit. Leases (C.) 9.

SEC. 109. **Intruder treated as guardian.**—When a person *intrudes* upon the lands of an infant and takes the profits thereof, he is treated as guardian, and is bound to account to the infant for the use of the lands and their rents and profits, and cannot interpose the Statute of Limitations as a bar.¹

¹ *Goodhue v. Barnwell*, Rice Ch. (S. C.) 198.

CHAPTER XV.

FEME SOLE—FEME COVERT.

SEC. 110. By feme sole.

SEC. 111. By feme covert.

SEC. 112. By husband and wife.

SEC. 113. As to leasehold estates of the wife.

SEC. 114. Rights of husband, in chattels real held by the wife or executrix.

SEC. 110. By feme sole.—A *feme sole* may make a valid lease of her lands, and a lease at will made by her while sole is not determined by her marriage, but the husband may put an end to it *ad libitum*, but in order to do so, he must do some express act to that end,¹ and the same rule prevails as to a lease at will made to a *feme sole*, and the will is not determined by her marriage.² But in the case of the marriage of a *feme sole* lessor, by the common law, the rent is payable to the husband, and ignorance of the marriage will not at law protect a lessee from a suit in the husband's favor therefor, although the rent has previously been demanded by and paid to the wife.³ But in most of the States of this country, the common-law rule as to lands owned by the wife, and her rights there-

¹ In *Henstead's Case*, 5 Coke, 10 a, the court resolved that the marriage of a *feme sole* did not determine a lease at will made by her, "for, although the woman, by marrying, submitted herself to the will of her husband, yet, forasmuch as it might be prejudicial to the husband to have the lease determined, it was determined that, without express matter done by the husband after marriage to determine the will, it is not determined,

¹ Roll's Abr. 861; *Blunden v. Baugh*, Cro. Car. 304; Co. Litt. 55 b; *Hembling's Case*, 4 Coke. 64 a.

² In *Blunden v. Baugh*, Cro. Car. 304, the court says, "Where a *feme* lessee at will takes husband, * * although the *feme* hath put her will in her husband, yet it shall not be said a determination without the election of the lessor or husband to the contrary," Co. Litt. 55, Dyer, 269, pl. 20.

³ *Tracy v. Dutton*, Cro. Jac. 617.

to and therein, has been essentially changed, and she is permitted to recover the rents accruing from lease thereof, whether they were made before or after marriage, and in determining her precise rights in this respect, the statute of a given State should be consulted.

When a *feme sole* executrix or administrator marries, the whole right of administration is transferred to the husband, and her sole demise cannot be supported. He must be the granting party in all leases made in right of such executorship or administration, and the wife's concurrence therein is not essential.¹ The husband becomes liable for all her acts in this representative capacity, and they may both be cited to account.² But by the marriage of a *feme sole* guardian, the husband acquires no right to possess or control the estate of the ward, and a payment to him on account of such estate is void, unless made with the sanction of the wife.³ By the marriage of a *feme sole* lessee, all her obligations under the lease devolve upon the husband, and he is liable for all arrears of rent, even after her decease, the arrears having accrued before,⁴ but they may be joined as defendant neither in an action for the rent, nor for a breach of any of the covenants of the lease.⁵

SEC. 111. By *feme covert*.—A lease made by a *feme covert* of her own lands, by the common law, is absolutely void, and cannot be confirmed.⁶ By the marriage, the husband is entitled to the use of the wife's estate, and she cannot, by any act of hers, divest him thereof,⁷ and so strict is this rule, that it is held that after a marriage

¹ *Levick v. Coppin*, 2 W. Bl. 801; *Arnold v. Bidgood*, Cro. Jac. 318.

² *Guardian, &c., v. Roberts*, 5 S. & R. (Penn.) 512; *Woodruff v. Cox*, 2 Redf. (N. Y. Surrogate) 153; *Maine v. Guischin*, 2 id. 165; *Edmundson v. Roberts*, 2 Miss. 322.

³ *Holmes v. Field*, 12 Ill. 424.

⁴ *Roll's Abr. Baron and Feme*, (G.) pl. 1; *Anonymous*, 6 Mod. 239; *Fane v. Minshow*, T. Raym. 6; *Vane v. Marshall*, 1 Lev. 25.

⁵ *Anonymous*, 6 Mod. 239.

⁶ *Manby v. Scott*, 1 Mod. 124;

Jennings v. Brogg, Cro. Eliz. 446; *St. John v. St. John*, 11 Ves. 529.

But she may, in the exercise of an express power, grant valid leases without the concurrence of her husband, *Sugden on Powers* (6 Edn.) 185. But in order to warrant the exercise of this power by her, it must expressly and distinctly appear that the donor of the power intended to exclude the disability of coverture. *Hearle v. Greenbank*, 3 Atk. 695.

⁷ *Den v. Quimby*, 3 N. J. L. 985;

engagement even, the husband acquires such inchoate rights in her estate, that upon the consummation of the engagement by marriage, he may invoke the aid of a court of equity to set aside conveyances made by her *after* such engagement without his knowledge, upon the ground that they are in fraud of his marital rights,¹ but not where the conveyance is made with his knowledge,² or in obedience to a mortal duty, as to provide for the support of her children by a former marriage.³ Thus it will be seen that by the common law, the husband becomes, by marriage, vested with such an interest in his wife's lands, that he can lease them or dispose of them as he pleases during his life, if he survives her, and during his own, if he becomes tenant by curtesy, and, as a consequence, any conveyance by her for however brief a term, or of however small an interest, is utterly void,⁴ as the rents and profits of her estate belong, by the common law, absolutely to him, so long as the coverture exists,⁵ and if her estate is sold and converted into money, the money becomes the property of the husband,⁶ and the same is true as to mort-

Boynton v. Finnall, 12 Miss. 193; Clarke's Appeal, 79 Penn. St. 376.

¹ Freeman v. Hartman, 45 Ill. 57; Logan v. Simmons, 8 Ired. (N. C.) Eq. 477; Williamson v. Carle, 11 N. J. Eq. 543; Crane v. Morris, 6 Pet. (U. S.) 598; Duncan's Appeal, 49 Penn. St. 67; McAfee v. Ferguson, 9 B. Mon. (Ky.) 475.

² Cheshire v. Payne, 16 B. Mon. (Ky.) 618; Fletcher v. Ashley, 6 Gratt. (Va.) 332; Terry v. Hopkins, 1 Hill (S. C.) Ch. 1; Cole v. O'Niell, 3 Md. Ch. 174.

³ Wilson v. Daniell, 13 B. Mon. (Ky.) 348; Green v. Goodall, 1 Coldw. (Tenn.) 404; Anonymous, 34 Ala. 43.

⁴ Jennings v. Brogg, Cro. Eliz. 446; Lynde v. McGregor, 13 Allen (Mass.) 182. He may lawfully convey the estate which he obtains in her lands by marriage. Trask v. Patterson, 29 Me. 499; but his interest ceases at her decease unless they had issue from the marriage, and in that event he has no

claim upon the estate for improvements made by him upon it. Marable v. Jordan, 5 Humph. (Tenn.) 577; and in case of his death, she may elect whether to defeat a lease made by him of her lands, or to affirm it. Brown v. Lindsay, 2 Hill (S. C.) Ch. 542.

⁵ Shaw v. Partridge, 17 Vt. 626; Clapp v. Stoughton, 10 Pick. (Mass.) 463; Burleigh v. Coffin, 22 N. H. 118; Dald v. Geiger, 2 Gratt. (Va.) 68; Haralson v. Bridges, 14 Ill. 37; Chancey v. Strong, 2 Root (Conn.) 369. But the husband may yield his marital rights, as between him and his wife, and permit her to collect and have the rents of her estate, and if he has permitted her to do so, he is estopped from recovering the rents paid to her by the tenant, and upon his decease the estate from which the rent accrued would go to her. Cheney v. Pierce, 88 Vt. 515.

⁶ Hamlin v. Jones, 20 Wis. 586; Martin v. Martin, 1 N. Y. 473; Crosby v. Otis, 32 Me. 256; Ward

gages and notes given to the husband for the purchase-money of her lands sold during coverture.' Where the wife has a dower interest in the estate of her former husband, the same rule prevails as to the rents and profits arising therefrom, or as to the proceeds of its sale.' But, as to her real estate remaining unsold at the time of her husband's death, she is remanded to her original rights as a *feme sole*,¹ and the same is also true when the marriage is dissolved by a divorce, *a vinculo*,² unless by statute the court is authorized to, and does, by the decree, give the lands to the husband. A *feme covert* is not bound by estoppel,³ nor can a bill for specific performance of a contract made by her to lease her lands, be maintained, as she can make no contract by which a remedy against her personally is given; ⁴ nor, although in such cases, the court acts *in rem*, and although she has power, and the court has jurisdiction over the rents and profits, is it believed that the court would give effect to her contracts upon the *corpus* of her property,⁵ but the rule is otherwise

v. Morrill, 1 D. Chip. (Vt.) 322; Chester v. Greer, 5 Humph. (Tenn.) 26; Ellsworth v. Hinds, 5 Wis. 613; Mann's Appeal, 50 Penn. St. 375. But where the land is sold for the purpose of a partition, it is generally held that the money received therefor is to be treated in equity as land, and the husband is not entitled to it without her assent. Stoner v. Cam. 16 Penn. St. 387; Mebane v. Yansey, 3 Ired. (N. C.) Eq. 88; Kempe v. Pittard, 32 Miss. 324; Eherts v. Eherts, 55 Penn. St. 110; Wardlaw v. Gray, 2 Hill (S. C.) Gh. 644; Davis v. Davis, 46 Penn. St. 342. But *contra*, see Jones v. Plummer, 20 Md. 416; Bank of the State v. Mitchell, Rice (S. C.) Ch. 389.

¹ Hawley v. Burgess, 23 Conn. 284; Talbot v. Dennis, 1 Ind. 471; McCrary v. Foster, 1 Iowa, 271.

² Ellsworth v. Hinds, 5 Wis. 613.

³ Daniels v. Richardson, 22 Pick. (Mass.) 565.

⁴ Doe v. Brown, 5 Black (Ind.) 309.

⁵ James v. Landon, Cro. Eliz. 37; Gretton v. Evans, Cro. Eliz. 700.

⁶ Aylett v. Ashton, 1 Myl. & Cr. 105. It is now well settled that a

feme covert having a separate estate will be bound to a specific performance of her contract for the leasing or sale of the same, if there is an entire absence of fraud, or undue influence or advantage. Wagstaff v. Smith, 11 Ves. Jr. 209; Pybus v. Smith, 3 B. & Ch. 340; Parkes v. White, 12 Ves. Jr. 501; Witte v. Dawkins, 4 Ves. Jr. 129; Whistler v. Newman, 5 Ves. Jr. 692, and in equity, her separate estate may be applied to the payment of a bond executed by her before marriage. Briscoe v. Kennedy, 1 B. & Ch. 118, or to the payment of a bond executed by her jointly with her husband. Peacock v. Monk, 2 Ves. 190; Norton v. Turvil, 2 P. Wms. 114, but when she thus applies her separate estate to the payment of her husband's debts, equity will reimburse her out of her husband's assets. Clinton v. Hooper, 3 B. & Ch. 201; Pocock v. Lee, 2 Vern. 604; Huntingdon v. Huntingdon, 2 id. 437; Tate v. Austin, 1 P. Wms. 164; Pateriche v. Pawlet, 2 Atk. 384.

¹ Platt on Leases, 49; Aylett v. Ashton, 1 Myl. & Cr. 105.

if she joins with her husband in a contract' as to land that is held by her "to her separate use" by devise or otherwise,' as in equity a *feme covert* is treated as a *feme sole* with respect to a separate estate, and may dispose of it without the consent or concurrence of her trustee, unless restrained by the instrument under which she holds.' And, though a particular mode of disposition is provided in the instrument under which she holds, it will not preclude her from adopting another mode, unless there are negative words restraining her power of disposition, except in the identical mode provided. Therefore, if she enters into any agreement, clearly indicating her intention to affect by it her separate property, a court of equity, if there be no fraud, or unfair advantage taken of her, will apply her separate property to satisfy such agreement,' and, if she contracts to lease, mortgage, or sell her estate, under the conditions last stated, she will be compelled to specifically perform.' The statutory changes in reference to the rights and powers of the wife over her estate, are such that the statute must be consulted to ascertain how far these principles apply in a given case, as it would be impracticable to note all of them in this work. A *feme covert* may take a lease of lands, and the estate vests until her husband dissents thereto,' but she may avoid the lease upon the death of the husband, or after the marriage is dissolved by a divorce *a vinculo*.'

SEC. 112. By husband and wife.—We briefly stated in the preceding section the rights acquired by the husband in

¹ Stead v. Nelson, 2 Beav. 245.

² Tullett v. Armstrong, 1 Beav. 1; Johnson v. Johnson, 1 Keen, 948; Acton v. White, 1 Sim. & Stu. 429; Newlands v. Paynter, 4 Myl. & Cr. 408; Vizoneau v. Pegram, 5 Leigh (Va.) 183.

³ Jaques v. Methodist, &c. Church, 17 John. (N. Y.) 348.

⁴ Jaques v. Methodist, &c. Church, ante; Mones v. Huish, 9 Ves. Jr. 369.

⁵ Stead v. Nelson, ante.

⁶ Co. Litt. 8 a; Swain v. Dolman, Hob. 204. In New York un-

der the statute giving married women the right to contract in reference to their own separate estate, it is held that she is liable for a leasehold acquired by her separately, it being treated as her separate property, and she is liable for the rent agreed upon. Westervelt v. Ackley, 62 N. Y. 508; Prevot v. Lawrence, 51 id. 219; Moxon v. Scott, 55 id. 247; Freeking v. Rolland, 58 id. 422.

⁷ Co. Litt. 8 a; Doe v. Brown, 2 Black (Ind.), 809; Dyer 18 a; Legg v. Legg, 8 Mass. 99.

the real estate of the wife by marriage, and it is unnecessary to repeat them here.¹ From what was there said, it will be understood that, by the common law, and in the absence of any statute to the contrary, the husband may demise the lands of his wife during their joint lives without her consent or concurrence,² and a lease made by him for a term that exceeds beyond his own life, is not void as to the wife, but upon his decease she may elect whether to affirm or defeat it,³ and if she accepts rent accruing thereon after her husband's decease, she will thereby be estopped from denying the validity of the lease for the balance of the term,⁴ and in any event, though she

¹ The husband takes an estate for the life of the wife, in her lands, if he survives her, and he may lease, sell or assign this interest therein, and it may be levied upon under an execution against him, *Cheek v. Waldron*, 25 Ala. 152. *Boynton v. Finnall*, 12 Miss. 198, except where it is exempted from levy by statute. *Coleman v. Sutterfield*, 2 Head. (Tenn.) 209; *Den v. Quimby*, 3 N. J. L. 985. He may, as previously stated, convey this freehold estate as he pleases, without her concurrence and against her protest. *Trask v. Patterson*, 29 Me. 499; *Lynde v. McCrezon*, 13 Allen (Mass.) 182; *Junction R. R. Co. v. Harris*, 9 Ind. 184; *Gonsalis v. Douchauquette*, 1 Mo. 666. But he has no right to commit waste upon her lands, therefore he cannot sell the growing trees thereon, except so far as good husbandry permits to reduce a due proportion of the land to cultivation. He can clear no more of it than a prudent owner of the fee would, having proper regard to the nature and situation of the land, and the future wants of the reversioners. *Strache v. Fehl*, 22 Wis. 337.

² *Hill v. Saunders*, 2 Bing. 112; *Eaton v. Whitaker*, 18 Conn. 222; *Lynde v. McGregor*, 13 Allen (Mass.) 182; *Wiscott's Case*, 2 Coke, 61 b. By the statute 32 H. 8, Chap. 28, husbands seized of lands in the right of the wife, or jointly with the wife, might make a lease thereof, for a term not exceeding twenty-one years, or three

lives, reserving a yearly rent, and is subject to certain restrictions that it is not necessary to enumerate. This statute was repealed by 19 & 20 Vic. chap. 120. sec. 85.

³ *Brown v. Lindsay*, 2 Hill (S. C.) Ch. 542; Co. Litt. 45; Bro. Leases 24; *Shipwith v. Steed*, Cro. Eliz. 769; *Jordan v. Wilkes*, Cro. Jac. 882; *Greenwood v. Tyber*, Cro. Jac. 563.

⁴ *Greenwood v. Tyber*, ante. If a lease is made by the husband, or by the husband and wife, for a term, without any reservation of rent, she may affirm it by bringing waste or accepting fealty, *Jackson v. Mordant*, Cro. Eliz. 112, and if rent is reserved and the lessee enters, and the husband dies before rent becomes due and the widow marries again, and her second husband accepts the rent under the lease, and dies, she cannot avoid the lease, for by her second marriage she transferred the power of avoiding the lease to her second husband, and she is bound by his ratification thereof. *Dyer* 159 a; *Rolle's Abr.* 475; *Rolle's Rep.* 321; 1, Bac. Abr. tit. Baron and Feme (C.) 498. But *SERGEANT WILLIAMS*, in a note to *Watton v. Hill*, *Saunders*, 188 b, doubts whether the law is well settled that a wife may affirm a lease made by the husband alone. He says: "It is said to be clearly agreed in all the books, that if the husband alone makes a lease of his wife's lands for years by indenture, reserving rent, it is a

joined with the husband in making the lease, and the execution thereof upon her part is void, it will be a good

good lease for the whole term, unless the wife by some act shews her dissent to it; for if she accepts rent which accrues due after his death, the lease is thereby become absolute and unavoidable. 1 Bac. Abr. 392, 3 Id. 305; Bro. Acceptance 10; Leases 24. Cro. Jac. 332; Jordan v. Wilkes, Co. Litt. 45 b; Plow. 187. Browning v. Beston, are cited as authorities in support of it. But it seems, notwithstanding, to be doubtful whether this is well warranted, though it is undoubtedly a good lease during the coverture; it is, however, certain that all the above mentioned authorities do not prove the position, as will be best seen on the following examination of them. Cro. Acceptance, 10, is an abridgment of the year-book 21 H. 7, 38, in which Conesby says, that if a lease is made by husband and wife of the wife's lands rendering rent, and the wife accepts rent after her husband's death, she has made the lease good. There is no doubt of this, but the material consideration is, that it does not support what it is cited to prove. So in Cro. Leases, 24, it is laid down, that if a husband seized in right of his wife leases her lands for years, and dies within the term, *the lease by his death is void*; so that this authority is directly contrary to the position it is cited to support. In Co. Litt. 45 b, it is observed that a man, seized in right of his wife, *together with his wife*, may by deed indented make leases for 21 years, or three lives, agreeable to the statute 32 H. 8, all which were voidable at the common law. It is true indeed that in Plow. 187 it is said by GAWDY, Sergeant *arguendo*, that if a man makes a lease for years of his wife's lands, and dies, the lease is not void before entry made by the wife; and this dictum is cited by counsel in argument in 1 Roll. Rep. 402, Smalman v. Agburrrough. In the case in Cro. Jac. 332, the husband made a lease of his wife's lands for five years in an ejectment for trial of the title, and died before the action was brought, and it was adjudged

that, inasmuch as the wife had not entered after her husband's death, the lease was not determined or void after her husband's death, but voidable only. On the other hand, it is said in Bro. *Cui in vita* 1, Acceptance, 1 S. C. that if a lease be made by the husband only, and he dies, and the wife accepts rent, the acceptance does not bind her, for she was not privy. And in Bro. Barre, 27, it is said, that if the husband alone leases for life, and dies, the wife cannot bring an action of waste, because she is not privy to the lease; and hence it follows, that the wife by acceptance of rent, where she was not party to the lease, shall not be bound, if it was a lease *for years*, but may enter; but if it be a lease for life, she is put to her *cui in vita*. F. N. B. 446, 7th edit. But there her acceptance of rent, where she was not a party to the lease, is no bar to the writ, and note the diversity. And in Bro. Acceptance, 6, it is observed, that if *husband and wife* join in a lease of the wife's land, rendering rent, and the husband dies, and the wife accepts rent, she is bound; but it is otherwise where *the husband alone* makes a gift, or lease, reserving rent, and dies, and the wife accepts rent, this will not bind her; note a diversity, *quod nullus contradixit*. However, it may be urged in support of the position in Bacon, that the *proviso* in the statute 32 H. 8, c. 28, s. 3, seems rather to prove that before the statute the law was as there stated. Perhaps the cases may be reconciled by distinguishing between leases *for life* and *years*, that in the former case, as the estate commenced by livery, it can only be avoided by entry; but that in the latter, the lease is absolutely void and determined by his death. Upon the whole, however, it appears that the law is not so *clearly* agreed as it is said to be in the passage cited out of Bacon's Abridgment." But, whatever may have been the diversity of opinion formerly, it is now universally conceded that the wife may affirm

lease during the husband's life, if the wife lives so long, or if they had a child born alive, so that he became tenant by curtesy.¹ But, where a lease is void as to her, as when it is not by deed, it cannot be affirmed by her, upon the death of her husband, by an acceptance of rent, *because her assent is necessary at the commencement of the lease.*² But where, by law, the husband and wife should join in a lease, or where they attempt to execute the instrument under the provisions of some statute, even though the lease does not follow the statute, it will be good so long as the coverture exists, if the husband has any interest in the estate,³ and it has always been held unnecessary in pleading a demise by husband and wife to set it up as being by deed, because in any event it would be good during the husband's life.⁴ But if the lease is by parol, it is not good except for such a term as, under the Statute of Frauds, may be granted by parol, and in case of the husband's death, it is absolutely void as to the wife, and is not and cannot be affirmed by an acceptance of rent by her, after her husband's death, so as to estop her from evicting the tenant,⁵ and this rule applies also in favor

such a lease. *Brown v. Lindsay*, 2 Hill, (S. B.) 542; *Woodfall's L. & T.* 47; *Doe v. Weller*, 7 T. R. 478; *Toler v. Slator*, 34 L. J. Q. B. 33; *L. R.* 3 Q. B. 42.

¹ *Bateman v. Allen*, Cro. Eliz. 438, as where the lease is by parol, it cannot be said to be the wife's lease. *Greenwood v. Tyber*, Cro. Jac. 563; *Walsal v. Heath*, Cro. Eliz. 656. If she disaffirms the lease after her husband's death, it has been held to make the lease void *ab initio*, and that she may plead *non demiseret*. *Thetford v. Thetford*, 1 Leon. 192; Cited 3 Coke, 28 a. If the husband does not become tenant by the curtesy, his sole lease of her lands becomes, at her death, void as to her heirs and all other persons claiming under, by or through her, and the husband cannot distrain for rent after her death, though the lease was the joint deed of both. *Howe v. Scarratt*, 4 H. & N. 28; *Hill v. Saunders*, 2 Bing. 112.

² *Dyer* 91 b; *Walsal v. Heath*,

Cro. Eliz. 656; *Greenwood v. Tyber*, Cro. Jac. 564.

³ *Wiscot's Case*, 2 Coke, 61 b. When the rents, income and profits of the wife's statutory estate are the mere incident of a suit for the recovery of the corpus, the action is properly brought in her name as sole plaintiff, but, when they are the subject of a separate suit, and accrue after marriage, the husband may recover them by action in his own name; and the fact that the lease was made by the wife *dum sola* does not affect his right of action. *Williamson v. Baker*, 78 Ala. 590. *Overruling Boggs v. Price*, 64 Ala. 514.

⁴ *Bateman v. Allen*, Cro. Eliz. 438; *Childs v. Westcot*, Cro. Eliz. 482.

⁵ *Turney v. Sturges*, 3 Dyer, 91 b; *Walsal v. Heath*, Cro. Eliz. 656; *Perry v. Hindle*, 2 Taunt. 181; *Childs v. Westcot*, Cro. Eliz. 481; *Bateman v. Allen*, id. 437; *Villers v. Beaumont*, 2 Dyer, 146 b; *Bro. Abr.* 96; *Barre*, pl. 27,

of all persons claiming under her.' A mere contract by the husband for a lease of his wife's freehold, cannot be enforced against her after his decease, even though by statute he has power to make a lease for a term extending beyond his own life.'

SEC. 113. *As to leasehold estates of the wife.*—The chattels real of the wife vest absolutely in the husband, and he may dispose of them by grant or demise.' He takes them as a gift by the marriage, and not as by purchase. The *jus disponendi* exists in him alone, and he may dispose of them absolutely by grant, demise or mortgage, and they may be taken upon execution against him. If he does not dispose of them, and she dies, they become his absolutely, but so long as she lives and he does not dispose of them, he holds them in her right, and cannot, as against her, dispose of them by will,' because, the *jus disponendi* not having been exercised by him, they revert to her upon his death.' But a conveyance upon conditions is a conveyance of the whole, and even though the conditions are broken after the husband's death, the estate

Shep. Touch. 280; Greenwood v. Tyber, Cro. Jac. 564.

'Harvey v. Thomas, Cro. Eliz. 216; 1 Rolle's Abr. 889.

'Darlington v. Pultney, Camp. 260; Anonymous, Freem. Ch. 224.

*In Yong v. Radford, Hob. 3, a mortgage of the wife's term by her and her husband upon her death, was held to vest the condition in the husband, the court holding that by the marriage the husband acquired full power to alien the term, and that if she died first the term would survive to him. In Ellsworth v. Hines, 5 Wis. 618, the widow having married again, sold her dower interest in her first husband's estate, and the court held that the second husband was entitled to the money realized therefrom, although he had loaned it upon securities in her name. See also Mann's Appeal, 50 Penn. St. 375. This rule applies equally to the wife's legal estate in chattels real, *in action*, of which she was dispossessed when married. By reducing them to

possession during coverture, he possesses the same interest in them that he has in her chattels real in possession, but if he does not reduce them to possession and dies, they survive to the wife. Co. Litt. 351 a.

*Harcourt v. Wyman, 3 Exchq. 817.

*In Daniels v. Richardson, 22 Pick. (Mass.) 565, a *feme sole*, being seized of an estate for her life in land, demised it for her life, reserving an annual rent without any clause of re-entry, and was subsequently married. The court held that the husband did not become seized of the estate in right of his wife, so as to make the rents and profits his own; that nothing remained to the lessor but the rent, which was a chose in action, and, not being reduced to possession by the husband, survived to the wife. See also Bolder v. Blackburn, Hob. 285; Hastings v. Douglass, Cro. Car. 844; Co. Litt. 351 a, 46 b; Doctor and Student, Dia. 1 Ch. 7 Plowd. 418.

does not revert to the wife,¹ because the conveyance is such a disposition or alteration of the term as vests it in the husband. So if he recovers the term in ejectment in his own name, it vests in him, and such is the case where he does any act that shows a clear intention to reduce the term to his own possession, and which effects such purpose.² Thus, if he leases the term and dies, the rent must be paid to his executor, and if he leases only a part of it, the wife takes only the residue, because rent is not regarded as an incident of a term for years.³ So he may make a lease of the term to take effect *after his decease*, and it will be operative and defeat the wife's reversion, although she survives him.⁴ The acceptance of a feoffment to the husband extinguishes a term to him and his wife.⁵ Thus in the case last cited a lease was made to a husband and wife for years, and they entered under it. The lessor afterwards conveyed the premises to the husband. After the husband's death the wife claimed the term, but the court held that the term was extinguished, because when the husband accepted the conveyance he must be treated as having surrendered the term. But they held that the rule would have been otherwise if the

¹ Co. Litt. 46 b.

² Comyn's Dig. Baron & Feme (E.) 2.

³ Sym's Case, Cro. Eliz. 33. In Loftus' Case, Cro. Eliz. 279, Loftus being possessed of a term for 18 years, and of another term in the same land in reversion for forty years, died intestate, and took out administration and entered and married, and her second husband leased the term for twenty-one years, and died, upon the question whether the wife or her executor should have the rent, PERIAM, J., said: "For the first term of years the executor shall have it, for the husband had given away all that term, and no interest remained in the *feme*, and the rent by the indenture shall go to the executor, *but* for the *residue* of the term of twenty-one years which is derived out of the term for forty years, the wife shall have it as annexed to the reversion or term which the

wife had." Manning's Case, 8 Coke, 96 b; Co. Litt. 46 b; Rolle's Abr. 841.

⁴ Grute v. Locroft, Cro. Eliz. 287. He may demise and thereby confer an immediate interest and possession, or he may underlet for a term to commence after his death, and thus defeat the reversion to his wife, though she survives him, for having an interest, he may dispose of all of it in his life, so as to bind the wife. Anonymous, Poph. 4; Herbin v. Chard, Poph. 96; so when he has disposed by any act in his life, of the interest of the term, and has created a term in the interest, *it is as good as if* he had granted all the term. Herbin v. Chard, ante; Grute v. Locroft, ante; Bacon's Abr. tit. Baron & Feme (C.) 2; Anonymous, Poph. 4, 1 Rolle's Abr. 344.

⁵ Downings v. Seymour, Cro. Eliz. 911.

conveyance had been by bargain and sale enrolled, or by fine. If a man makes a lease to a *feme sole*, for a term, of land in which he has the fee, and afterwards marries her, her term is not merged in his estate, because he has the inheritance in his own right, and the term, in the right of his wife, and, unless he disposes of the term during his life, the law will preserve it for the wife, and it will survive to her upon his death.¹ Where the wife is possessed of a contingent interest in a term for years, the husband may dispose of it, and if he makes no disposition thereof, and dies, it belongs to the wife.² But when the contingency is one that cannot happen while the husband lives, he has no interest therein, and even though he conveys it, his conveyance will not defeat the rights of the wife.³

SEC. 114. **Rights of husband in chattels real held by the wife or executrix.**—It can hardly be said that the husband, by marriage, takes an absolute interest in chattels real, held by her as executrix, and the rule is, that upon her death they go to the administrator *de bonis non* of the testator or intestate.⁴ The law makes no gift to him of chattels real, held by her *en autre droit*.⁵ But there would seem to be no question but that, by the common law, where the husband is possessed of a term for years, held by his wife as executrix of another, he has power to grant, demise or convey the same. It is well settled that he may administer in right of his wife without her consent, but she cannot administer without his consent, and if he can administer *jure uxoris* without her consent, it is incident to the power of administration to sell or dispose of a term for years, and he may do whatever his wife could have done as executrix, if sole.⁶ “In case of

¹ *Bracebridge v. Cook*, Plowd. 418; *Grey v. Acton*, 1 Salk. 326.

² *Co. Litt.* 351 a 46, b.

³ In *Grey v. Acton*, 1 Salk. 362, *HOLT, C. J.*, says, “Where the wife hath any right or duty *which by any possibility may happen to accrue during coverture*, the husband may, by release, discharge it; but where

the wife hath a right or duty, *which by no possibility can accrue to her during coverture*, the husband cannot release it.

⁴ *Co. Litt.* 351 a.

⁵ *Ibid.*

⁶ *Loftus' Case*, Cro. Eliz. 279; *Levick v. Coppin*, 3 Wils. 277; *Wankford v. Wankford*, 1 Salk. 306.

a *feme covert* made executrix," says HOLT, C. J.,¹ "the husband has a great power; he may administer and bind her, though she refuses, and may release the debts of the testator."² When a term or other personal estate is given in trust for the wife's separate use, the husband is not entitled to any beneficial use thereof. As to such property, the wife is treated as a *feme sole*, and may control the income therefrom as she pleases, without any interference on the part of the husband. But if a term is settled upon her before marriage, and she permits her husband to have the rents and profits, she can make no claim therefor against his estate upon his decease.³ But as to trusts of terms to the wife generally, he has the same right to dispose of them that he has to dispose of those which are conveyed to her directly, and he may apply the rents and profits therefrom to his own use.⁴ But this rule does not prevail as to terms or estate settled upon the wife before marriage, which, by the terms of the settlement, go to her children upon her decease,⁵ or which in any means evince a clear and plain intention to exclude the husband's marital rights,⁶ and in the absence of express words to that effect, the husband's marital rights will not be excluded any farther than the language used will warrant,⁷ and if the instrument does not in terms, or by fair construction, secure the property to her "for her separate use," the husband's right to the use thereof

¹ Wankford v. Wankford, ante.

² In *Levick v. Coppin*, the question was whether a husband possessed of a term for years, in right of his wife, as executrix of her former husband, had power to grant it, and the court were unanimously of opinion that he had. See *Dyer*, 183 a, n 57; *Ferguson v. Collins*, 8 Ark. 241; *Lindsay v. Lindsay*, 1 Dessau (S. C.) 150. Questions of this character will seldom arise in our courts, as in many of the States it is provided by statute that the marriage of an executrix or administratrix shall terminate her powers. In Alabama, under the Code, a married woman is not entitled to act as executrix without the consent of her husband, but it is held that her

appointment, without his consent, is good. *English v. McNair*, 34 Ala. 40.

³ Comyn's Dig. Chancery, 2 (M.) 9.

⁴ Bacon's Abr. Tit.; Baron & Feme (C.) 2.

⁵ Comyn's Digest Chancery, 2 (M.) 9. He cannot release a provision made in favor of his wife and her children. *Gilmore v. Johnson*, 29 Ga. 67.

⁶ *Roane v. Han*, 1 Wash. (Va.) 47; *Mitchell v. Gates*, 23 Ala. 438; *Williamson v. Mason*, 23 id. 488; *Pollard v. Merrill*, 15 Ala. 169; *Waters v. Tazwell*, 9 Md. 291; *Mason v. Deese*, 30 Ga. 308.

⁷ *Carroll v. Renich*, 15 Miss. 798.

attaches,¹ and his interest therein may be seized upon his debts,² and he may dispose of it by grant or demise.

¹ Barrett v. Barrett, 4 Dessau (S. C.) 447.

² Rivers v. Thayer, 7 Rich. (S. C) Eq. 138.

CHAPTER XVI.

BY LUNATICS, IDIOTS, INTOXICATED PERSONS, &C.

SEC. 115. Generally.

SEC. 116. By intoxicated persons, or persons under duress.

SEC. 117. By persons under duress.

SEC. 118. By persons under the influence of fraud.

SECTION 115. **Generally.**—*Prima facie* leases made by a lunatic, idiot, or other person *non compos mentis*, are valid, but it may be avoided, if not by himself, by his privies in blood, or by his representatives.¹ Formerly it was held that such persons could not avail themselves of their infirmity in avoidance of a lease or other conveyance made by them, because they could not be permitted to stultify themselves, but that their legal representatives, or privies in blood, alone possessed the right to set up such matters in avoidance thereon.² But this rule, never having any foundation in reason, is not now recognized, and a conveyance of any kind, whether by lease or deed, executed by persons in either of the conditions named, while not absolutely void, is voidable, as well by the lessor or grantor himself³ as by his privies in blood or legal representatives,⁴ and the lessor or grantor, or any person

¹ *Beverley's Case*, 4 Coke, 124 a; *Yates v. Boen*, 2 Stra. 1104.

² *Beverley's Case*, ante; *Addison v. Dawson*, 2 Vern. 678.

³ *Arnold v. Richmond Iron Works*, 1 Gray (Mass.) 484; *Summers v. Pumphrey*, 24 Ind. 281; *Cotes v. Woodson*, 2 Dana (Ky.) 452; *Allis v. Billing*, 6 Met. (Mass.) 415; *Madrox v. Simmons*, 81 Ga. 512; *Crowther v. Rowlandson*, 27 Cal. 376; and this is so whether the mental incapacity arose from drunkenness or any other cause, and whether

the contract be by deed or parol. *Jenners v. Howard*, 6 Blackf. (Ind.) 240; *Lang v. Whidden*, 2 N. H. 435; *Rice v. Peet*, 15 John. (N. Y.) 503; *Seaver v. Phelps*, 11 Pick. (Mass.) 304; *Thornton v. Appleton*, 29 Me. 298; *Mitchell v. Kingman*, 5 Pick. (Mass.) 481; *Talson v. Garner*, 15 Mo. 494; *Webster v. Woodford*, 3 Day (Conn.) 90.

⁴ *Keeble v. Cummins*, 5 Hayw. (Tenn.) 43; *Parris v. Cobb*, 5 Rich. (S. C.) Eq. 450.

claiming under him, may, in order to avoid his conveyance, show his own lunacy, idiocy, or drunkenness at the time it was made.¹ A want of absolute and perfect mental soundness, does not necessarily affect his capacity to make a lease, provided the mind is capable of comprehending the full import of the act;² and a contract made by a lunatic even, may be binding upon him, unless the other party knew, or ought to have known of his mental infirmity, and took some unfair advantage of him.³ But if there is any imposition shown, as, if the consideration is very inadequate, either a court of equity or a jury in a court of law, will give weight to slight evidence calculated to establish imposition or circumvention.⁴ A deed or lease made by a person *non compos*, while under guardianship, is absolutely void,⁵ but if not under guardianship, a lease or other conveyance made during a lucid interval, cannot be impeached upon the ground of prior or subsequent insanity.⁶ As to leases made by the guardian of a person *non compos*, it may be said that, unless the statute expressly specifies their powers, they are subject to the same rules as guardians for infants.⁷ As to the power of a committee over such persons and their prop-

¹ *Bellew v. Clark*, 2 Ired. (N. C.) L. 23; *Morris v. Clay*, 8 Jones (N. C.) L. 216; *Bensell v. Chancellor*, 5 Whart. (Penn.) 371; *Ingraham v. Baldwin*, 9 N. Y. 45; *Cook v. Parker*, 5 Phila. (Penn.) 265; *Bliss v. Conn. R. R. Co.*, 24 Vt. 424.
² *Hovey v. Hobson*, 55 Me. 250; *Dennett v. Dennett*, 44 N. H. 531; *Odell v. Buck*, 21 Wend. (N. Y.) 142; *Miller v. Craig*, 36 Ill. 109; *Speers v. Lewell*, 4 Bush. (Ky.) 239; *Rippy v. Gaunt*, 5 Ired. (N. C.) Eq. 443.

³ *Richardson v. Strong*, 18 Ired. (N. C.) 106; *Sims v. McLure*, 8 Rich. (S. C.) Eq. 286; *Lincoln v. Buckmaster*, 32 Vt. 652; *Skidmore v. Ramline*, 2 Bradf. (N. Y. Surrogate) 122; *Bennan v. McDonnell*, 9 Exchq. 309; *Molton v. Camroux*, 2 Exchq. 487; *Dane v. Kirkwall*, 8 C. & P. 679; *Elliott v. Ince*, 7 De G. M. & G. 475; *Brown v. Jadrell*, 1 Moo. & M. 105.

⁴ *Wilson v. Oldham*, 12 B. Mon.

(Ky.) 55; *McFadden v. Vincent*, 21 Tex. 47; *Hale v. Bowen*, 11 Ala. 87.

⁵ *Mohr v. Tulip*, 40 Wis. 66; *Elston v. Jasper*, 45 Tex. 409; *Nichols v. Thomas*, 53 Ind. 42.

⁶ *Hardin v. Hays*, 14 Penn. St. 19; *Wilkinson v. Pearson*, 23 id. 117. But in order to establish insanity at the time when the contract was made, evidence of the state of his mind just before, at, and after such time, is advisable. *Peasley v. Robbins*, 8 Met. (Mass.) 164; *Grant v. Thompson*, 4 Conn. 208; *Negro Jerry v. Thompson*, 9 Md. 145; *Watson v. Anderson*, 11 Ala. 43; *Hendrix v. Money*, 1 Bush. (Ky.) 306; *Dickenson v. Barber*, 9 Mass. 225; but proof of insanity at remote periods before or after the conveyance was made, is not admissible. *Harden v. Hays*, 14 Penn. St. 91.

⁷ See Sec. 91 et seq., *Thompson v. Boardman*, 1 Vt. 370.

erty, the statute authorizing their appointment must be consulted, and in the absence of power given by statute, they have no power to lease.¹

SEC. 116. By intoxicated persons, or persons under duress'—A deed, lease, or other conveyance, executed by a person in such a state of intoxication as to destroy his capacity to contract, may be avoided by him, and he will be permitted to show his intoxication either in an action against him, predicated upon such instruments, or in an action in his favor to avoid them,² and the rule is the same, both at law and in equity,³ and that too whether the grantee connived at the intoxication or not.⁴ If connivance at his intoxication is shown on the part of the grantee, the grantor would not be bound, if any undue advantage was shown to have been taken of his condition, although he was not wholly deprived of his senses, as in such a case, the contract would be tainted with fraud.⁵ In order, however, to operate as a defence to an action at law predicated upon a lease or other contract, or to secure the interposition of a court of equity and set it aside, he must show that such a state of intoxication existed as seriously impaired his reasoning faculties, or deprived him of the exercise of his understanding at the time when it was entered into,⁶ or that his mind had become so impaired

¹ Knipe v. Palmer, 2 Wils. 180.

² In Pitt v. Smith, 8 Camp. 34, LORD ELLENBOROUGH said: "Intoxication is good evidence upon a plea of *non est factum* to a deed of *non consensit* to a grant, and of *non assumpsit* to a promise." See also Butler v. Mulvihill, 1 Bligh. 160.

³ In Cook v. Clayworth, 18 Ves. Jr. 16, SIR W. GRANT, M. R., said: "As to that extreme state of intoxication that deprives a man of his reason, I apprehend that even at law, it would invalidate a deed obtained from him while in that condition." Jenners v. Howard, 6 Blackf. (Ind.) 240. In Gore v. Gibson, 13 M. & W. 623, the court were unanimously of the opinion that intoxication was a good defence to an action upon a lease, deed, grant

or simple contract, provided the person making it was so far deprived of his senses as not to know what he was doing. Butler v. Mulvihill, 1 Bligh. 187.

⁴ Gore v. Gibson, ante; Drummond v. Hopper, 4 Harr. (Del.) 327; Barrett v. Buxton, 1 Aik. (Vt.) 167; Foot v. Tewksbury, 2 Vt. 97; Burroughs v. Richman, 13 N. J. L. 233; Wiggleston v. Steers, 1 H. & M. (Va.) 70.

⁵ Say v. Barwick, 1 V. & B. 195; Butler v. Mulvihill, ante; Cooke v. Clayworth, 18 Ves. 12; Pitt v. Smith, 8 Camp. 33.

⁶ Pickett v. Sutter, 5 Cal. 412; Barrett v. Buxton, 2 Aik. (Vt.) 167; Wade v. Culvert, 2 Mill. (S. C.) 27; Taylor v. Patrick, 1 Bibb. (Ky.) 168. Burroughs v. Richman, 13 N. J. L. 233; Foot v. Tewksbury,

by previous intoxication as to render him incompetent to contract, even though at the time he was not intoxicated.¹ Thus, in a Pennsylvania case,² the court held that a person who had been reduced to such a state of debility by intoxication as to be unable to rise or sit up in bed unless supported, or to hold a pen and make a mark, unless the pen and hand were held by another, is no more fit to make a conveyance than a person in an actual state of intoxication; and by reference to the preceding cases, it will be seen that if the previous intoxication of the lessor, grantor or contractor, has impaired his mental faculties to such an extent that he is not in the exercise of his reasoning powers, his contract is voidable, although he is not physically debilitated. The personal representatives of a party, or any person claiming under, by, or through him, may avail themselves of his intoxication as a defence, or to set aside an instrument executed by him.³

SEC. 117. *By persons under duress.*—A person who executes a lease or other contract by duress, may avail himself thereof, when freed therefrom, either in defence to an action thereon, or as a ground for setting it aside,⁴ but the privilege is personal, and neither his creditors nor a stranger to the contract, can avail themselves of it, as a ground for setting aside a contract to which he him-

2 Vt. 97; *Lee v. Ware*, 1 Hill (S. C.) 313; *White v. Cox*, 3 Hayw. (Tenn.) 82; *Broadwater v. Dorne*, 10 Mo. 277; *Birdsong v. Birdsong*, 2 Head. (Tenn.) 289; *Drummond v. Hopper*, 4 Harr. (Del.) 327. In a case heard and decided in the Supreme Court of the United States, the court held that, *whenver there is great weakness of mind*, though not amounting to absolute disqualification, arising from age, sickness, or any other cause, in a person executing a conveyance and the consideration is grossly inadequate, a court of equity will, upon seasonable application of his representatives or heirs, set it aside, and the same rules prevail where it is shown that the party executing the conveyance

is likely to be easily influenced. *Allore v. Jewett*, 94 U. S. 506; see also *Yard v. Yard*, 27 N. J. Eq. 114. But where there is no evidence of fraud or undue influence, the mere fact that a person is aged and infirm, affords no ground for interference. *Crow v. Peters*, 63 Mo. 429.

¹ *White v. Cox*, Hayw. (Tenn.) 79; *Birdsong v. Birdsong*, 2 Head. (Tenn.); *Mansfield v. Watson*, 2 Iowa 111.

² *Wilson v. Bigger*, 7 W. & S. (Penn.) 111.

³ *Wigglesworth v. Steers*, 1 H. & M. (Va.) 70.

⁴ *Kelsey v. Haply*, 16 Pet. (U. S.) 269; *Knight's Case*, 3 Leon. 239; *Hackett v. King*, 6 Allen (Mass.) 565; *Foss v. Hildreth*, 10 id. 76.

self makes no objection.¹ Duress by threats must, in order to be available as a defence to, or a ground for, setting aside a lease, be of such a character as to excite a fear of some grievous wrong, or of great bodily harm or unlawful punishment,² and such as would be likely to overcome the will of a person of ordinary courage and firmness.³ Threatening to do a legal act, as to sue a person and attach his property, or to arrest him upon the writ, when the same may legally be done, and the party has a probable ground of action against him, does not amount to duress.⁴ But, where a person threatens to do an unlawful act under the color of legal process, as to imprison the persons threatened, and the party threatened is ignorant of his rights, and through fear of such unlawful imprisonment executes a lease, or enters into any contract, it is avoidable upon the ground of duress,⁵ as where a person threatens to arrest a person in an action, in which an arrest cannot lawfully be made, if the threat is of such a character as is sufficient to overcome the mind and will of a person of ordinary firmness, it is such duress as will avoid a contract made under its influence.⁶ So, even though a person is arrested upon a legal warrant, and by a proper officer, yet, if the object of the process was to extort money from the defendant, and to enforce the settlement of a civil claim against his will, it is an abuse of the process, and such duress as will operate as a defence to any conveyance made under its influence, and as will induce a court of equity to set it aside.⁷ The rule may

¹ *Lewis v. Bannister*, 16 Gray (Mass.) 500; *McClintock v. Cummins*, 3 McLean (U. S. C. C.) 158.

² *Burr v. Burton*, 18 Ark. 214; *Hazlerigg v. Donaldson*, 2 Met. (Ky.) 445.

³ *Harman v. Harman*, 61 Me. 227, 14 Am. Rep. 556; *State v. Sluder*, 70 N. C. 55; *Bosley v. Shauner*, 26 Ark. 280; *Beckwith v. Frisbie*, 32 Vt. 559; *Maxwell v. Griswold*, 10 How. (U. S.) 242; *Durr v. Howard*, 6 Ark. 561.

⁴ *Davis v. Susler*, 64 Mo. 43; *Gresham v. Landees*, Ga. Dec. Part 2, 149; *Eddy v. Herrin*, 17 Me. 338;

Sheppard v. Watrous, 3 Cai. N. Y. 166.

⁵ *Whitfield v. Longfellow*, 13 Me. 146.

⁶ *Foss v. Hildreth*, 10 Allen (Mass.) 76; *Wade v. Simon*, 2 C. B. 548.

⁷ *Hackett v. King*, 6 Allen (Mass.) 58; *Breck v. Blanchard*, 22 N. H. 303, 9 Viner's Abr. 317 tit. Duress (B) pl. 1; 2 Bacon's Abr. tit. Duress (A); *Osborn v. Robbins*, 36 N. Y. 365. The rule may be summarized as follows: When an arrest is made for an improper purpose without just cause; or where there

be said to be that, to constitute duress, under the influence of fear or restraint by an arrest under a legal process, *the arrest must either have been illegal in its inception, or must have become so by a subsequent abuse of the process.*¹ And it seems that duress may be predicated of conveyances made, or contracts entered into, when a person is illegally restrained of his liberty, even though such conveyances were made or agreements entered into by the advice or through the instrumentality of his counsel, as a means of securing the removal of such illegal restraint. Thus, in an English case,² the plaintiff was confined in a lunatic asylum, and an inquisition under a commission of lunacy being held upon her, and attended by her counsel, before any verdict was given, an agreement was signed by her counsel and the counsel for the promoters of the commission, that the plaintiff should be released from confinement, that certain arrangements should be made as to property which she claimed; that the title deeds relating thereto, which had been taken from her when she was confined, and now were in the hands of the promoters, should be given up and placed in the

is an arrest for just cause without lawful authority, or where there is an arrest for just cause and with lawful authority, for improper purposes, it constitutes duress. *Strong v. Grannis*, 26 Barb. C. (N. Y.) 122; *Watkins v. Baird*, 6 Mass. 511; *Richardson v. Duncan*, 3 N. H. 508; *Thompson v. Lockwood*, 15 John. (N. Y.) 256. So if one arrests another under pretence that he has a warrant, when he has not, or when he has a warrant, but it was illegally issued, or is illegal for a failure to comply with certain statutory requirements, any conveyance or contract procured by such means is void. Indeed mere fear of imprisonment is sufficient to constitute duress. *Foshey v. Ferguson*, 5 Hill (N. Y.) 154; *Whitfield v. Longfellow*, 13 Me. 146; *Eddy v. Herrin*, 17 Me. 338. Chitty on Contracts, 168, Co. Inst. 483, Co. Litt. 253 b, Bacon's Abr. tit. Duress, Comyn's Dig. tit. Pleader (W) 20. So where an arrest is lawful and regular in

form, yet, if it was procured by perjury, it is such duress as vitiates any contract made under its influence. *Strong v. Grannis*, ante.

¹ *Richardson v. Duncan*, 3 N. H. 508; *Stouffer v. Latshaw*, 2 Watts. (Penn.) 167; *Meek v. Atkinson*, 1 Bailey (S. C.) 84; *Watkins v. Baird*, 6 Mass. 511; *Sheppard v. Watrous*, 8 Cai. (N. Y.) 166; *Richards v. Vanderpool*, 1 Daly (N. Y. C. P.) 71. In *Fay v. Outley* it was held that, where a creditor procures a requisition for an arrest of a debtor, whom he has procured to be indicted in another State for a criminal offence, and he abuses the process by holding it over the debtor as a means of making him pay or secure the debt, intending then to let him escape, all contracts growing out of this abuse of the process are utterly void. See also *Gardner v. Williams*, Dudley (Ga.) 424; *Whitfield v. Longfellow*, 13 Me. 146; *Breck v. Blanchard*, 22 N. H. 308.

² *Cummings v. Iver*, 11 Q. B. 112.

hands of one of the defendants, and that the commission should be superseded. All of which was done. The plaintiff then brought detinue against the defendant therefor, to whom, under the agreement, the title deeds had been delivered, for the deeds. An issue was made, and the court held that the plaintiff was not bound to prove her title to the deeds, the only question being whether the agreement prevented her from insisting on her title; also, that it was rightly left to the jury to say, on evidence of the state of plaintiff's mind and health at the time the agreement was made, whether the consent of her counsel was obtained by constraint and without her free will; and the jury having so found, that the plaintiff was entitled to the verdict; and that the legality of the restraint (assuming it to have been legal), and the consent of counsel, furnished no conclusive proof that the agreement was not void by duress. LORD DENMAN, C. J., said: "That her counsel exercised a sound discretion, and did the best for their client's interest, we do not for a moment doubt. But they are not invested with any superior power, with the power and duty of guardianship over the lunatic. Their right to act for her is derived from herself alone. As long as she was at liberty, she might authorize them to appear in her behalf and disprove the imputed insanity; but as she was incompetent (by the hypothesis) from making any contract, she was incompetent to appoint any one to deal for her in relation to her liberty or her property. If, on the other hand, her counsel acted for her, believing her of sound mind, from the same fear of inconvenience and disease, as likely to arise from her confinement, which affected the mind of their principal, *their proceeding ought to be considered as enforced by the same duress.*

SEC. 118. **By person under influence of fraud.** A lease or other conveyance that is entered into through fraud on the part of the lessor or lessee, may be avoided upon that ground, and upon the principle that fraud vitiates all contracts. But mere misrepresentations, which are false, do not necessarily amount to fraud, as they may have

been innocently made. In order to have that effect, there must have been an *intent* to deceive, in reference to a material matter,¹ or if not wilfully made, it must have related to a matter about which it was the duty of the party making it to have known the truth,² and in the latter case, even though the misrepresentation was innocently made, if it related to a *material matter*, the party injured may recover the damages he sustains therefrom, in a court of law,³ or may resort to a court of equity to have the lease or conveyance set aside.⁴ Fraud may consist in the suppression of the facts, and when it is the duty of a party to state the facts, and he omits to do so, it furnishes a good ground for an action at law for damages, or for the intervention of a court of equity to set the lease or deed aside.⁵ But, ordinarily, a court of equity will not interfere in a case of fraud, where there is a clear, plain and adequate remedy at law,⁶ nor where the fraud alleged is the result of false reasoning from facts truly stated,⁷ or relates to a mere matter of judgment,⁸ nor where the alleged fraud was perpetrated *after* the contract was made,⁹ or did not influence the party seeking relief,¹⁰ or the party was not injured thereby,¹¹ or where he had equal opportunities with the other party for ascertaining the truth,¹² or where he has been guilty of unreasonable delay in applying for relief.¹³ In all cases, the party alleging, must prove the fraud, as it will never be inferred from facts which may be consistent with honest

¹ Taylor v. Leith, 26; Ohio St. 428; Stitt v. Little, 63 N. Y. 426; Dunn v. White, 63 Mo. 181; Dulancy v. Rogers, 64 id. 201; Morehouse v. Yeager, 41 N. Y. Superior Ct. 135.

² Foard v. McComb, 12 Bush. (Ky.) 723; Craig v. Ward, 1 Abb. (N. Y.) App. Dec. 454.

³ Goodwin v. Robinson, 30 Ark. 535; Frenzel v. Miller, 37 Ind. 1; Elder v. Allison, 45 Ga. 13.

⁴ Griffin v. Sketoe, 30 Ga. 300; Marghy v. Haner, 7 John. (N. Y.) 341; Hoitt v. Holcomb, 23 N. H. 535; Relf v. Eberley, 23 Iowa, 467; Turnbull v. Gadsden, 2 Strobb. (S. C.) Eq. 14; Martin v. Blyth, 4 J. J. Mar. (Ky.) 491.

⁵ Gregg v. Woodruff, 14 Ark. 9;

Smith v. Richards, 13 Pet. (U. S.) 86; State v. Halloway, 8 Blackf. (Ind.) 45; Torrey v. Buck, 2 N. J. Eq. 386.

⁶ Miller v. Scammon, 52 N. H. 609.

⁷ Bowman v. Bates, 2 Bibb. (Ky.) 47.

⁸ Halls v. Thompson, 9 Miss. 443.

⁹ Fulton v. Loftus, 63 N. C. 393.

¹⁰ Stephens v. Orman, 10 Fla. 9; Boyce v. Watson, 29 Ga. 517.

¹¹ Jewitt v. Davis, 10 Allen (Mass.) 68; Davidson v. Moss, 6 Miss. 673.

¹² Grantland v. Wight, 7 Munf. (Va.) 179.

¹³ Munn v. Worrell, 16 Barb. (N. Y.) 221; Cox v. Montgomery, 36

intentions.¹ When the fraud appears upon the face of a lease or deed, it may be invalidated in a court of law,² but where the fraud consists in matter *dehors* the lease, it is voidable only in equity.³ The subject of fraud, and the rights and remedies of the landlord or tenant therefor, will be treated fully, *post*.

Ill. 896; McLean v. Barton, Harv. (Iowa) 77; Obert v. Hammell, 18 (Mich.) 279; McDowell v. Goldsmith, 2 Md. Ch. 370; Kern v. Burnham, 28 Ala. 428; Gifford v. Thom, 9 N. J. Eq. 702.

¹ Stute v. Kinkh, 3 Ala. 353; Harris v. Ransom, 54 Miss. 504; Pratt v. Phillbrook, 39 Me. 17.

² Arnold v. Grimes, 2 Greene (Iowa) 77; Obert v. Hammell, 18 N. J. L. 78.

³ Arnold v. Grimes, ante; Holley v. Younge, 27 Ala. 203; Reservoir Co. v. Chase, 14 Conn. 123; Pocock v. Hendricks, 8 G. & J. (Md.) 441; Anderson v. Hill, 20 Miss. 679; White v. Jones, 4 Call. (Va.) 253.

CHAPTER XVII.

BY EXECUTORS OR ADMINISTRATORS.

SEC. 119. Common law, powers of.

SEC. 120. Leases by executors, voidable in equity, though good at law

SEC. 121. When executor is an infant.

SEC. 119. Common law, powers of.—At the common law, executors and administrators may dispose absolutely of terms for years vested in them in right of their testators or intestates, and may lease the same for any fewer number of years, and the rents reserved on such leases are assets in their hands, and go in course of administration;¹

¹ 4 Bacon's Abr. Tit. Leases (l.) 7; Sir Moyle Finch's Case, 6 Coke, 67 b; Keating v. Keating, Slayd. & G. temp. Sugd. C. 183. In So. Carolina by an early statute (1791), leasehold estates go to the executor and are distributable by him under the provisions of that act. Payne v. Harris, 3 Strobb. (S. C.) Eq. 89. An administrator or executor of a lessee, who does not quit and surrender the demised premises immediately after his appointment, or upon a notice to quit, until a judgment for the possession thereof has been obtained against him, but keeps the property of his intestate there for several weeks, and sells it by auction upon the premises, and claims of an under-tenant of a portion of the premises, rent which accrued after his intestate's death, must be held to have entered and taken possession of the premises, and is personally liable to the lessor, for rent thereof, until his estate therein was terminated by the notice to quit, to the extent of the real value of the use of the premises. Inches v. Dickinson, 2 Allen (Mass.) 71. If an executor or administrator, or one who assumes to act in the latter capacity,

takes a renewal in his own name of a lease to the testator or intestate, although the lease does not provide for a renewal, he is nevertheless bound to account to the estate for the value of the new lease. Zilkin v. Carhart, 3 Bradf. (N. Y. Surrogate) 876; Engel v. Buricker, 34 Mo. 93;—An executor or administrator is authorized to make reasonable repairs upon a leasehold estate. Ames v. Daivany, 1 Bradf. (N. Y. Surrogate) 321. In Palmer v. Stenier 68 Ala. 400, it was held that the rule of the common law, that on the death of the lessor, rent already accrued passes to his personal representative while rent subsequently accruing follows the reversion, and belongs to the heir, has been modified by the statutes, conferring on personal representatives, power to intercept the descent to the heir, and to take the rents accruing, and to rent or sell the lands, when necessary for the payments of debts, and when, in the exercise of this statutory power he claims the accruing rents, his right and title to them are the same that he has to any other choses in action of the decedent.

and executors deriving their authority from their testator may make valid leases of any premises that devolve upon them as such, by the will under which their power is derived, even before the will has been proved ;' but an administrator, deriving all his powers from an appointment by a competent tribunal, cannot grant a lease until letters of administration have been granted to him.' A lease by one of several executors' or administrators' is good, as they are all regarded as an individual person, and have a joint and entire interest in the property.' In New York and some other States this power is specially conferred by statute, and relates to the execution of a conveyance, as well as to a sale, by one ;' and if part of the executors refuse to act, the others may execute the power,' and the fact that the power is given to them in

¹ Bendall v. Summerset, 2 W. Bl. 692; Rolle's Abr. Executors (A.); Hudson v. Hudson, 1 Atk. 480.

² Wankford v. Wankford, 1 Salk. 801; Toller's Exrs. 95; Hudson v. Hudson, ante; 1 Platt on Leases, 807; Fawcett's L. & T. 30; Bank v. Dudley, 2 Pet. (U. S.) 498; 1 William's Exrs. 354.

³ Chandler v. Ryder, 102 Mass. 268; Doe v. Hayes, 7 Taunt. 222; Bunner v. Storm, 1 Sandf. Ch. (N. Y.) 887; Anonymous, Dyer, 23 b. Simpson v. Gutteridge, 1 Madd. 609; Pennel v. Fern, Cro. Eliz. 347; Hayes v. Sturges, 7 Taunt. 217; Rolle's Abr. Executors, (O.); Davone v. Fanning, 2 Johns. Ch. (N. Y.) 252; Ogden v. Smith, 2 Paige Ch. (N. Y.) 195.

⁴ Jacomb v. Harwood, 2 Ver. Sr. 267.

⁵ Jacomb v. Harwood, ante; Comyn's Dig. tit. Administrators (B.), 12. In Anonymous, Dyer, 23 b. n. 146, it is said that a release, surrender of a term, confession of judgment, or attornment of one executor is binding upon all, and that seems to be the case as to all lawful acts done by one; but for his torts, as for waste committed by one, the others are not bound, nor are the others bound by an act of the other which could not lawfully be done by all. Kelset v. Nicholson, Cro. Eliz. 378, Inst. 327; Argol's Case, Palm. 405. See also Boudereau v. Montgomery, 4

Wash. (U. S. C. C.) 186; Wintermute v. Redington, 1 Fish. Pat. Cas. (U. S. C. C.) 330. Where two executors are authorized by the will to sell the real estate, unless the will specially provides for a joint execution of the power, it survives to one, upon the death of the other. Peter v. Beverly, 10 Pet. (U. S.) 532; Bank v. Beverly, 1 How. (U. S.) 184. So one executor may assign the intestate's interest in a patent, Wintermute v. Redington, ante; or release or dispose of any of the assets of the estate, Boudereau v. Montgomery, ante. One executor may lease to another, and the rent may be distrained for. Cowper v. Fletcher, 34 L. J. C. B. 187; Black's Estate, 1 Tucker (N. Y. Surrogate) 95; 9 Cow. (N. Y.) 84; 2 Barb. Ch. (N. Y.) 151; 3 id. 71. In Kincade v. Coffley, 64 N. C. 387, where two administrators were charged with negligence in investing funds in Confederate securities when the act was done by one of them, it was held that both were liable, unless the other dissented. See also Bart v. Bart, 41 N. Y. 76, as to the rule where one takes and withholds from the other all the property of the estate. Executors, as such, are not liable for torts. Plimpton v. Richards, 59 Me. 115.

⁶ Bunner v. Storm, ante.

⁷ Roseboom v. Mosher, 2 Den. (N. Y.) 61; Sharp v. Pratt, 15

the plural number does not defeat the right of one or more to execute it,' and in all cases where the power is given to them *virtute officii*, a surviving executor may lease or sell according to the power given, and if one renounces the trust, the acting executor under the statute of Henry 8, chap. 4, may do so ;' and the same is true where one neglects to act, and such neglect may be shown like any other matter *in pais*, and a renunciation need not be proved.' In the case of an executor if a term is bequeathed to him, his right to underlet for any period is not abridged by a limited power of leasing, given him by the will.' At the common law, if a female executrix marries, her sole demise cannot be supported. The husband must be the granting party in all leases made in right of such representative capacity,' and it is immaterial whether she joins with him in the deed or not.' In this country, the rights, powers and duties of executors and administrators are largely regulated by statute ; and in ascertaining whether or not they can lease *the lands* belonging to the estate of their testator or intestate, both the will and the statute should be examined. In some of the States, where the common-law rule prevails, the administrator takes neither estate, title nor interest in the real estate of his intestate,' while in others, by statute, he

Wend. (N. Y.) 610; Jackson v. Given, 10 John. (N. Y.) 167.

¹ Powell on Devises, 302; Zebach v. Smith, 3 Brew. (Penn.) 72; Co. Litt. 113 a.; Hargrave's Notes 2.—

² Chew v. Evans, 1 Penn. Leg. Gaz. 168; Zebach v. Smith, ante; Bartlett v. Sutherland, 24 Miss. 395; Bain v. Mattison, 54 N. Y. 663.

³ Wood v. Sparks, 1 D. & B. (N. C.) 389; Roseboom v. Mosher, ante; Sharp v. Pratt, ante; Robertson v. Gaines, 10 Humph. (Tenn.) 367; Jackson v. Burtis, 14 John. (N. Y.) 391; Anderson v. Turner, 3 A. K. Mar. (Ky.) 131; Taylor v. Galloway, 1 Ohio, 232; Houck v. Houck, 5 Penn. St. 273; Bartlett v. Sutherland, ante; Taylor v. Adams, 2 S. & R. (Penn.) 534; Franklin v. Osgood, 14 John. (N. Y.) 527; Jenkins v. Stauffer, 3 Yates (Penn.) 168.

⁴ Hayes v. Sturges, 7 Taunt. 217.

⁵ Arnold v. Bidgood, Cro. Jac. 318; Levick v. Coppin, 2 W. Bl. 801.

⁶ Levick v. Coppin, ante; Jenk. Cent. 79, Case 56; Chambers on Leases, 35; 1 Platt on Leases, 368-9; Woodfall's L. & T. 51, 52.

⁷ Phelps v. Frankenhouser, 39 Ill. 401; Vanier v. Fisher, 10 Humph. (Tenn.) 211; Stearns v. Stearns, 1 Pick. (Mass.) 157; Comparet v. Randall, 4 Ind. 55; Le Foot v. Delafield, 3 Edw. Ch. (N. Y.) 82. In Michigan, the authority to take possession, &c., given by statute, was repealed in 1871. Campau v. Campau, 25 Mich. 127. At the common law an executor or administrator has nothing whatever to do with anything except the personal assets of his testator or intestate, and except where provision is otherwise made by stat-

holds the estate, until the estate is finally settled, for the benefit of the creditors and payment of debts, and a final distribution is made,' and the same rules apply to an executor, *unless the will expressly places the real estate in his control.*' The statutory possession of an administrator or executor of the lands of the deceased is not a personal chattel, nor a subject of sale, but is given solely to enable him to lease the premises during the period of administration, if necessary, and receive the rents and profits thereof during the settlement of the estate.' In some of the States power to lease is given by statute, and applies to all lands owned by the intestate, and the particular mode of leasing is prescribed; and in such cases the lessee must see to it that all the statutory provisions in this respect are complied with, or the lease may be avoided by the heirs,' while in others it is held that this power relates only to lands that have been subdued, and does not include waste lands,' and in others the power can be exercised only by order of a particular court.' A mere power to sell lands given either by statute or wills, does not include a power to lease them. But where an executor or administrator

ute he has no other or greater authority. An executor *virtute officii* takes by force of the probate of the will, and this does not embrace naked powers respecting real estate, nor special trusts or powers coupled with an interest. As to all such special powers he is deemed to be a mere trustee, and as trustee under such powers and trusts he neither becomes executor, nor as executor does he succeed to such trusts. *The King v. Jenkins*, 1 Dowl. & Ry. 41; therefore he may proceed to execute the trusts without proving the will. He is, to that extent, trustee, and derives his powers from the will alone. *Judah v. Gibbons*, 5 Wend. (N. Y.) 225; *Conklin v. Egerton*, 21 id. 430; *Roome v. Phillips*, 29 N. Y. 357; consequently, a person who is appointed administrator *cum testamento* does not succeed to the special powers conferred by the will, where such special power is a special trust or confidence reposed by the testator in the person

named in the will. He stands upon his common-law powers, and such as the statute gives in addition thereto. *Dunning v. Ocean Bank*, 61 N. Y. 497.

¹ *Edwards v. Evans*, 16 Wis. 181; *Cox v. Ingleston*, 80 Vt. 258; *Kline v. Moulton*, 11 Mich. 370; *Lockwood v. Lockwood*, 2 Root (Conn.) 409; *Crocker v. Smith*, 83 Me. 244; *Meeks v. Hahn*, 20 Cal. 620; *Lane v. Thompson*, 43 N. H. 820; *Bowers v. Williams*, 84 Miss. 824; *Easterling v. Blythe*, 7 Tex. 210; *Williams v. Rawlins*, 10 Ga. 491; *Logan v. Caldwell*, 23 Mo. 273.

² *Williams' Executors*, 1235; *Maberley v. Maberley*, 6 C. & P. 176.

³ *Kline v. Moulton*, 11 Mich. 370. ⁴ *Chighizoler v. Le Baron*, 21 Ala. 406.

⁵ *Murphy v. Thomas*, 41 Miss. 429.

⁶ *Platt v. Dawes*, 10 Ind. 60.

⁷ *Rubottom v. Borrow*, 22 Ind. 202. In *Seymour v. Bell*, 3 Day

assumes to lease lands which they strictly have no right to lease, they are bound to account to the person or persons legally entitled to the lands therefor, and if they occupy the lands themselves, they must account to such person for the rents not exceeding the profits of the lands.¹ An administrator with the will annexed cannot execute a power conferred upon an executor either to sell or lease real estate,² and this was held to be the case in New York under a statute giving to such administrators the same powers as the executor had; it being held that the statute related only to the personalty,³ but this doctrine was subsequently disapproved, and the statute held to relate to powers in reference to realty as well as to personalty.⁴ The reason why an administrator with the will annexed does not possess the power relating to the realty conferred upon the executors, is that the executor takes as devisee and not as executor, and this relation to the will cannot, in the absence of a statute to that end, be conferred upon an administrator.⁵ In California it is held, under the statute, that the administrator *cum testamento annexo*, possesses the same power as the executor

(Conn.) 381, power was given the executors to sell and dispose of the lands in such way and manner as they should judge most beneficial to the devisees. The court held that this provision amounted to a power to sell only, and gave them no authority to lease them. See also *Floyd v. Herring*, 64 N. C. 409; *Wamble v. George*, 64 id. 759; *Myer's Appeal*, 9 Phila. (Penn.) 810.

¹ *Smith v. King*, 22 Ala. 558; *Goodrich v. Thompson*, 4 Day (Conn.), 215; *Fisher v. Fisher*, 1 Bradf. N. Y. Surrogate 855; *Blount v. Johnston*, C. & N. (N. C.) 551; *Carlisle's Appeal*, 38 Penn. St. 259.

² *Dominick v. Michael*, 4 Sandf. (N. Y. Superior Ct.) 374; *Matter of Place*, 7 N. Y. Leg. Obs. 217; *Gilchrist v. Rea*, 9 Paige Ch. (N. Y.) 66. *Vardeman v. Ross*, 36 Tex. 111. Unless it is clear that the testator intended them to pass to him in case his executors died or refused to qualify. *Ingle v. Jones*, 9 Wall. (U. S.) 486. In Kentucky it is held

that he may sell as directed by the will, although the power of the executor is discretionary. *Gulley v. Prother*, 7 Bush. (Ky.) 167. In New York the administrator does not take the powers of the executor when a personal confidence or trust in the discretion of the executor is plainly expressed or implied. *Brain v. Mattison*, 54 N. Y. 663; *Dunning v. Ocean Bank*, 61 N. Y. 497.

³ *Conklin v. Egerton*, 21 Wend. (N. Y.) 420.

⁴ *Matter of Anderson*, 5 N. Y. Leg. Obs. 302.

⁵ *Dominick v. Michael*, ante, *McDonald v. King*, 1 N. J. L. 481; *Lucas v. Doe*, 4 Ala. 676; *Harper v. Smith*, 7 Ga. 461; *Perry v. Gill*, 2 Humph. (Tenn.) 218; *Montgomery v. Milliken*, 13 Miss. 151; *Owens v. Cowan*, 7 B. Mon. (Ky.) 152; *Brown v. Hobson*, 8 A. K. Mar. (Ky.) 880; *Brush v. Young*, 28 N. J. L. 237.

had,' so in Virginia,¹ North Carolina,² Pennsylvania,³ and in all the States when the statute gives such administrators the powers of the executor, unless the power is expressly or necessarily connected with a personal trust.⁴ MR. WOODFALL, in his excellent treatise,⁵ says: "Previous to a party taking a lease from an executor or administrator, with will annexed, he ought to ascertain whether the property has been specifically bequeathed by the will, and if so, whether the executor has assented to such bequest; for if so, his right to grant the lease is gone, and the legal interest of the property is vested in the trustee, and consequently as the executor has nothing to grant, the lease will be void, and the legatee may maintain ejectment." But until such assent, the term remains in the

¹ *Kidwell v. Burmmagin*, 32 Cal. 436.

² *Brown v. Armistead*, 6 Rand. (Va.) 594.

³ *Hester v. Hester*, 2 Ired. (N. C.) Eq. 330.

⁴ *Kuper v. Schwartz*, 47 Penn. St. 503.

⁵ *Dominick v. Michael*, ante; *Farwell v. Jacobs*, 4 Mass. 634. In Virginia, where a will provided that the executors might sell the land for as much as in their judgment will be equal to its value, it was held that under the statute, an administrator with the will annexed, might exercise the power. But in Kentucky, where a will provided that the executors might sell the lands in their discretion, it was held a personal trust, that an administrator *cum testamento* could not exercise. *Brown v. Hobson*, 3 A. K. Mar. (Ky.) 320. In *Anderson v. McGowan*, 42 Ala. 280, the will directed all of the testator's property to be divided equally between his wife and children, and that the shares of his children should be sold after the payment of the debts, and constituted the executors trustees to loan out the money, and directing the taking of security therefor, and that the trust should continue as to each child, until they were of suitable age to marry. An administrator *cum testamentis*, under a supposition that this power passed

to him, and without any order of court, and without setting apart the shares, proceeded to and did sell, the real and personal estate of the testator. The court held that the will created a personal trust which the executor alone could execute, without the intervention of a court of equity, or some statutory regulation, and that the trust did not pass to the administrator *cum testamento*, and that his sales of real estate and personal property were without authority, and void as to the children, and that he was chargeable with the value of the personal estate sold, and with the rent of the land from the time of sale. In the same case, at a subsequent term, the court held that the words, "It is my will that the shares of property which shall be allotted to my children, shall be sold by my executor, &c.," did not create a personal trust, and that the power passed to the administrator. *Anderson v. McGowan*, 45 Ala. 402.

⁶ Woodfall's L. & T. (9th Eng. Ed.) 51.

⁷ *Paramour v. Yardley*, Plowd. 539; *Young v. Holmes*, 1 Stra. 70; *Say v. Guy*, 3 East, 120; *Johnson v. Warwick*, 17 C. B. 516; *Fenton v. Clegg*, 9 Exchq. 680; *Sturgess v. Tatchell*, 3 B. & Ad. 675; *Cole on Ejectment*, 529.

executor, with power to dispose of the same, and does not pass to the legatee." Mr. PLATT says: "As a practical caution, we may mention, that a person proposing to take from an executor a lease of premises specifically bequeathed to another, should obtain if possible the concurrence of the legatee; *for after the executors assent to the bequest*, the legal title vests in the legatee, at whose suit an action of ejectment will lie against the purchaser."

SEC. 120. *Leases by executors voidable in equity though good at law.*—Leases made by executors or administrators, although good at law, are nevertheless voidable in equity, unless shown to be a due administration of the assets, and will be set aside upon proper application, for *any* sufficient cause; as, that a sale thereof is required to pay the debts of the estate, or for the advantage of the heirs or those beneficially interested therein; or, that the lease was improvidently granted; or where it is an undue execution of the executor's power, or is fraudulent, or tends to enable the executor to commit a fraud.¹ Thus, in one case,² the executors who were also trustees under a will for the sale of premises, entered into an agreement to grant an underlease thereof, but the defendant subsequently refused to perform the agreement, upon the ground that the will gave the executors authority only to sell, and did not authorize them to lease. Upon a bill brought to compel the defendant to specifically perform the agreement and take the lease, the court refused, in the absence of proof of circumstances justifying the leasing of the premises, to compel the defendant to perform. But at the same time, the Vice-Chancellor (SIR L. SHADWELL) intimated that circumstances might exist, that would justify the executors in departing from the words

¹ *Maberley v. Maberley*, 6 C. & P. 126; 2 Williams' Executors, 1235; *Cole on Ejectment*, 529.

² 1 Platt on Leases, 370.

³ *Chamberlain v. Chamberlain*, 1 Ch. Cas. 256; *Young v. Holmes*, 1 Stra. 70; *Saunders' Case*, 5 Coke 12 b.

⁴ *Drohan v. Drohan*, 1 Ball & B.

185; *Keating v. Keating*, Lloyd. & Goo. Ca. temp. Sugd. 613.

⁵ *Margrave v. Archbold*, 1 Dow. P. C. 107; See *Hatchett v. McNamara*, Slayd. & Goo. temp. Plunkett C. 283.

⁶ *Keating v. Keating*, ante.

⁷ *Evans v. Jackson*, 8 Sim. 217.

of the trust, and that, when such a condition was shown to exist, and the *cestui que* trusts were also before the court, a contract of that character might be enforced against the other party thereto. An executor or administrator, and even an administrator *de bonis non*, may be compelled to execute an under-lease or a renewal thereof, under a contract entered into by them, which they had authority to make. Thus, in one case,¹ an administratrix underlet a portion of her intestate's leasehold property, and covenanted that "she, her executors, administrators and assigns," would renew the lease, as she or they should obtain a renewal from the superior landlord. After her death, and the appointment of an administrator *de bonis non* of the intestate, it was held that the lessee might enforce a specific performance against such administrator, upon the ground that the acts of the administratrix were both a legal and equitable disappropriation from the assets of the intestate, and that the administrator *de bonis non* who had entered into the receipt of the rents reserved by the lease, had no right to do so, and yet claim exemption from liability upon the covenants, and for the acts of the administratrix, and that the land, in his hands, was bound by her covenants, if it was so bound while in hers.

SEC. 121. **When executor is an infant.**—Where the executor is an infant, administrator is usually granted until the infant becomes of age, and a lease made by the administrator for a term exceeding the duration of infancy, will be good until the infant executor becomes of age,² and it has been suggested that it would be good until he enters to defeat it.³

¹ Hatchett v. McNamara, ante.

² Finch's Case, 6 Coke. 63 a.

³ Prince's Case, 5 Coke, Cro. Eliz.

718; Sir Moyle Finch's Case, 6 id. 67 b.

CHAPTER XVIII.

BY MORTGAGOR AND MORTGAGEE.

- SEC. 122. Relation of the mortgagor and mortgagee to each other.
SEC. 123. By mortgagor.
SEC. 124. When tenant not entitled to crops.
SEC. 125. Mortgagor and mortgagee should join in lease.
SEC. 126. Lease by mortgagee.
SEC. 127. Effect of a covenant to permit the mortgagor to take rents,
&c.
SEC. 128. Liabilities of a mortgagee in possession.

SEC. 122. Relation of the mortgagor and mortgagee to each other.—There is much confusion in the cases as to the precise relation of a mortgagor and mortgagee to the estate, but this confusion results mainly from a difference in the form of the mortgages under which the decisions have arisen, and, in some instances, from the peculiar provisions of statutes relating to the matter. The mortgagor has sometimes been treated as a tenant at will to the mortgagee, or as a mere tenant at sufferance, but, until condition broken and foreclosure, a mortgagor is treated, both at law and in equity, as the legal owner of the estate, the mortgage being only a security, and the mortgagee having only a lien upon the land, as a security for his debt.¹

¹ *Elfe v. Cole*, 26 Ga. 197; *Casborne v. Scarfe*, 1 Atk. 603; *Jackson v. Lodge*, 36 Cal. 28; *Thayer v. Cramer*, 1 McCord (S. C.) Ch. 395; *McMillan v. Richards*, 9 Cal. 365; *United States v. Athens Armory*, 35 Ga. 344; *Fay v. Cheney*, 14 Pick. (Mass.) 399; *Caruthers v. Humphrey*, 12 Mich. 270; *Bryan v. Butts*, 27 Barb. (N. Y.) 503; *Hall*

v. Savill, 3 Iowa 37. But in some of the States the legal title is held to pass for some purposes. Thus in *Glass v. Ellison*, 9 N. H. 69, it was held that, for the protection of the interests of the mortgagee, and in order to give him the full benefits of his security, the legal estate passes, but that for other purposes the mortgage is in general held to

But in some of the States it is held that a mortgage in fee, passes both the legal and equitable estate, defeasible by the performance of the condition according to its legal effect.¹ The preponderance of authority, however, is in favor of the doctrine that the title remains in the mortgagor, at least until after condition broken (and in many of the States, until after foreclosure),² and in England, while the mortgagor is in possession, or in receipt of the rents and profits, he is treated as a freeholder, and as such, is entitled to vote in the election of members of parlia-

operate only as a mere security for the debt. See also to same effect, *Clark v. Rayburn*, 1 Kan. 281. In many of the States, as between the mortgagor and mortgagee, it is held that the title passes, but not as to third persons. *Terry v. Rosell*, 32 Ark. 478.

¹ *Blaney v. Bearce*, 2 Me. 182; *Briggs v. Fish*, 2 D. Chip. (Vt.) 100; *Carter v. Taylor*, 2 Head (Tenn.) 30; *Erskine v. Townsend*, 2 Mass. 495.

² *Whitmore v. Shiverick*, 3 Nev. 288; *Jackson v. Lodge*, 36 Cal. 28; *McMillan v. Richards*, 9 Cal. 365; *Goodenow v. Ewer*, 16 Cal. 461; *Boggs v. Hargrave*, Id. 559; *Fogarty v. Sawyer*, 17 Cal. 586; *Dutton v. Warshauer*, 21 Cal. 609; *Bludworth v. Lake*, 38 Cal. 265; *Davis v. Anderson*, 1 Ga. 176; *Rayland v. Justices, &c.*, 10 Ga. 65; *Elfe v. Cole*, 26 Ga. 197; *United States v. Athens Armory*, 35 Ga. 344; *Seals v. Cashier*, 2 Ga. Dec. 76; *Hall v. Savill*, 3 Iowa 37; *Chick v. Willets*, 2 Kan. 384; *Caruthers v. Humphrey*, 12 Mich. 270; *Bryan v. Butts*, 27 Barb. (N. Y.) 503; *Thayer v. Cramer*, 1 McCord (S. C.) Ch. 395.

In Alabama, a mortgagee is regarded as possessing a dural nature, bearing one character in a court of law and another in a court of equity, but the legal estate is treated as remaining in the mortgagor until condition broken, when it at once vests in the mortgagee, leaving only an equity of redemption in the mortgagor. *Welsh v. Phillips*, 54 Ala. 309. In Arkansas the legal estate, as between the mortgagor and mortgagee, is treated as being in the latter, but as to third persons, it is in the mortgagor. *Terry v.*

Rosell, 32 Ark. 478; *Collins v. Torry*, 7 John. (N. Y.) 278; *Blanchard v. Brooks*, 12 Pick. (Mass.) 47. In *Kansas, Life Association v. Book*, 20 Kan. 19; *Michigan, Wagar v. Stone*, 36 Mich. 364; *Nebraska, Harley v. Estes*, 6 Neb. 386; *California, Jackson v. Lodge*, ante; *Georgia, Rayland v. Justices*, 10 Ga. 65; *Nevada, Whitman v. Shiverick*, 3 Nev. 288; and indeed in most of the States, a mortgage is held to be a mere security, vesting no estate in the mortgagee until after foreclosure, *Myers v. White*, 1 Rawle (Penn.) 353; *State v. Laval*, 4 McCord (S. C.) 336; *Cheever v. R. R. Co.*, 39 Vt. 368; while in Rhode Island, Connecticut, New Hampshire, Minnesota, Indiana, North Carolina, Mississippi, Missouri, and Massachusetts, the common-law rule with some limitations prevails. It is a mere incident of the debt, and falls with it. *Morris v. Bacon*, 133 Mass. 58; *Benton v. Bailey*, 50 Vt. 137.

In New York, by statute, an action of ejectment by a mortgagee is abolished, and, in the absence of any contract for possession, the mortgagor is entitled thereto, and to the rents and profits of the estate, unless, upon a proper showing as to the inadequacy of the security, and the irresponsibility of the mortgagor, the courts will appoint a receiver of the rents. *Astor v. Turner*, 11 Paige Ch. (N. Y.) 436; *Sea Ins. Co. v. Stebbins*, 8 id. 565; but after sale, a tenant who went in under the mortgagor, and was made a party to the proceedings, is bound to attorn to the purchaser. *Lovett v. Church*, 9 How. Pr. (N. Y.) 226.

ment,¹ and is entitled to retain possession until the mortgagee enters or brings ejectment,² and is not liable to the mortgagee for the rents, or profits of the premises.³ The right of the mortgagor to retain possession of the premises, and, consequently his right to lease the same after mortgage, is generally upheld, but must depend largely upon the language of the mortgage, and upon the statutes relating thereto, in the several States. But, without stopping to discuss the relation of the parties to the estate, further, it may be said that the tenant can acquire no greater rights than the mortgagor himself had, but may defend his title under the lease to the same extent that the mortgagor could, and may even redeem the estate, to protect his term.⁴

SEC. 123. **By mortgagor.**—A lease made for a term of years, of premises which are subsequently mortgaged by the lessor, is valid and binding against the mortgagee and all persons claiming under him,⁵ but at the common law the mortgagee may,⁶ *after condition broken* and a right

¹ Will. 4, c. 45, § 23.

² Rex v. Edington, 1 East, 293; Keech v. Hall, 1 Doug. 21; Bree v. Holbech, 2 id. 635; Reading of Judge Trowbridge, 8 Mass. 551; Clark v. Rayburn, 1 Kan. 281.

³ Renard v. Brown, 7 Neb. 449. The mortgagor's right to lease and take the rents, continues until it is divested by some positive interference of the mortgagee. Dunn v. Tillery, 79 N. C. 497; Chadbourne v. Henderson, 53 Tenn. 460; Gibson v. Farley, 16 Mass. 280.

⁴ Rogers v. Moore, 11 Conn. 553. As to tenant's right to redeem, see Averill v. Taylor, 8 N. Y. 44.

⁵ Rogers v. Humphreys, 4 Ad. & El. 209; Moss v. Gallimore, ante; Burden v. Thayer, 3 Met. (Mass.) 79; Babcock v. Kennedy, 1 Vt. 457; Coker v. Pearsall, 6 Ala. 342; Baldwin v. Walker, 21 Conn. 168; Fitchburg Mfg. Co. v. Melvin, 15 Mass. 268; 2 Cruise's Digest, 111; Smith v. Taylor, 9 Ala. 633.

⁶ Marx v. Marx, 51 Ala. 222. At the common law a mortgage, made after the lease is executed, is treated as a grant of the reversion, so

that, after condition broken, the mortgagee may, by notice to the tenant, entitle himself to the rent and all the remedies for the collection thereof that were possessed by the mortgagor. Moore v. Titman, 44 Ill. 367; Baldwin v. Walker, 21 Conn. 168; Russell v. Allen, 2 Allen (Mass.) 42; Babcock v. Kennedy, 1 Vt. 457; and it has been held in Massachusetts, that this applies as well to rent already accrued as to that which accrues after the mortgage, Mirick v. Hopkin, 118 Mass. 542; and in Indiana it has been held that, where the tenant has given a note for advance rent, it may be defeated by notice from the mortgagee, but we apprehend that this will depend entirely upon the question whether the note, at the time when notice was given, was in the hands of a bona fide holder for value. In the former case, the note cannot be said to operate as a payment of the rent, while in the latter case, it does, and, as the tenant may pay his rent in advance, the mortgagee cannot

of entry attaches in his favor, so that he can maintain

defeat the note in the hands of an innocent holder, either by notice, or in any manner, provided the note was given, or the payment made, in good faith and without reference to defeating the claim of the mortgagee. The leading case upon this point that is followed in this country is *Keech v. Hall*, 1 Doug. 279, in which the doctrine stated in the text was held, except as to the clause relating to the right of the second mortgagee, which is sustained by the case first cited. In that case, an action of ejectment was brought by a mortgagee against a person who went into possession under a lease after the mortgage was made. The lease was at rack-rent. The mortgagee had no notice of the lease, nor the lessee of the mortgage. The defendant offered to attorn to the mortgagee before suit brought. There was no notice to quit. It was held that the plaintiff was entitled to recover, LORD MANSFIELD saying: "The question for the court to decide is, whether by the agreement understood between mortgagors and mortgagees, which is that the latter shall receive interest and the former keep possession, the mortgagee has given the mortgagor implied authority to let from year to year at a rack-rent; or whether he may not treat the defendant as a trespasser, disseisor or wrong-doer. * * Where the lease is not a beneficial lease, it is for the interest of the mortgagee to continue the tenant; and where it is, the tenant may put himself in the place of the mortgagor, and either redeem himself or get a friend to do it. The idea that the question may be more proper for a court of equity goes upon a mistake. It emphatically belongs to a court of law, in opposition to a court of equity; for a lessee at a rack-rent is a purchaser for a valuable consideration, and in every case, between purchasers for a valuable consideration, a court of equity must follow, not lead, the law. On full consideration we are all clearly of opinion, that there is no inference of fraud or consent against the mortgagee, to prevent him from considering

the lessee as a wrong-doer. It is rightly admitted that if the mortgagee had encouraged the tenant to lay out money, he could not maintain this action; but here the question turns upon the agreement between the mortgagor and mortgagee: when the mortgagor is left in possession, the true inference to be drawn is an agreement that he shall possess the premises *at will* in the strictest sense, and therefore no notice is ever given him to quit, and he is not even entitled to reap the crop, as other tenants at will are, because *all is liable* to the debt; on payment of which the mortgagee's title ceases. The mortgagor has no power, express or implied, to let leases not subject to every circumstance of the mortgage. If, by implication, the mortgagor had such a power, it must go to a great extent to leases where a fine is taken on a renewal for lives. The tenant stands exactly in the situation of the mortgagor. The possession of the mortgagor cannot be considered as holding out a false appearance. It does not induce a belief that there is no mortgage; for it is the nature of the transaction that the mortgagor shall continue in possession. Whoever wants to be secure, when he takes a lease, should inquire after and examine the title-deeds. In practice, indeed (especially in the case of great estates), that is not often done, because the tenant relies on the honor of his landlord; but, whenever one or two innocent persons must be a loser, the rule is, *qui prior est tempore potior est jure*. If one must suffer it is he who has not used due diligence in looking into the title. It was said at the bar, that if the plaintiff, in a case like this, can recover, he will also be entitled to the *mesne* profits from the tenant, in an action of trespass, which would be a manifest hardship and injustice, as the tenant would then pay the rent twice. I give no opinion on that point; but there may be a distinction, for the mortgagor may be considered as receiving the rents in order to pay the interest, by an implied authority from the mortgagee, till he determines his will. As to the lessee's

ejectment against the mortgagor, intercept the rents

right to reap the crop which he may have sown previous to the determination of the will of the mortgagee, that point does not arise, in this case, the ejectment being for a warehouse; but however that may be, it could be no bar to the mortgagee's recovering in ejectment. It would only give the lessee a right of ingress and egress to take the crop; as to which, with regard to tenants at will, the text of *LITTLETON* is clear. We are all clearly of opinion that the plaintiff is entitled to judgment. This doctrine has been held in the numerous cases since *Thunder v. Belcher*, ante; *Smarth v. Williams*, 1 Salk. 245; *Doe v. Giles*, 5 Bing. 421; *Lull v. Matthews*, 19 Vt. 323; *Morey v. McGuire*, 4 id. 327; *Doe v. Maisley*, 8 B. & C. 767; *Doe v. Giles*, 5 Bing. 421. In *Latimer v. Moore*, 4 McLean (U. S.) 110, it was held that a person in possession must account to the mortgagee for the rents and profits, but this is not the rule held by the courts, nor indeed would it be an equitable or just rule, at least except as to rents accruing subsequent to a notice to that end from the mortgagee. The rule is, that, so long as the mortgagor remains in possession, or until actual entry by the mortgagee, the mortgagor may receive the rents and profits to his own use, and is not liable to account therefor to the mortgagee. *Mayo v. Fletcher*, 14 Pick. (Mass.) 525; *Crosby v. Hanlow*, 21 Me. 499. At least, unless the security is insufficient, and then only by an order of a court of equity, and extends only to the deficiency, *Astor v. Turner*, 11 Paige Ch. (N. Y.) 496, nor will a receiver of the rents be appointed until the mortgage debt becomes due. *Bank of Ogdensburgh v. Arnold*, 5 id. 83. But, *when the mortgagee is entitled to possession*, he may intercept the rents by notice to the tenant, and from that time the tenant must pay them to him. *Babcock v. Kennedy* 1 Vt. 457; *Mansory v. U. S. Bank*, 4 Ala. 785; *Branch Bank v. Fry*, 23 Ala. 780; *Clarke v. Abbott*, 1 Md. Ch. 474. And the mortgagee is then in possession, and may be

compelled to account to the mortgagor for the rents and profits so received by him either by way of reduction of the mortgage debt in proceedings to foreclose, or by a bill to redeem brought by the mortgagor. *Onderdonk v. Gray*, 19 N. J. Eq. 65; *Robinson v. Robinson*, 1 N. H. 161; *Kellogg v. Rockwell*, 19 Conn. 446; *Harrison v. Wyse*, 24 Conn. 1; *Reitanbaugh v. Ludwick*, 31 Penn. St. 181; *Thorp v. Feltz*, 6 B. Mon. (Ky.) 6. But this liability continues only so long as the right of redemption exists. "A tenant under a lease made prior to the mortgage," says MR. PLATT in his excellent work upon leases, vol. I, p. 163, "cannot be turned out of possession by the mortgagee otherwise than by virtue of a proviso for re-entry on non-payment of rent, or non-performance of covenants, the mortgagee, as assignee of the reversion, having no other rights than those exercisable by the mortgagor. *Moss v. Gallimore*, 1 Doug. 279; *Birch v. Wright*, 1 T. R. 378; *Rogers v. Humphreys*, 4 Ad. & El. 299. But to secure himself the benefits of the rents and covenants, the mortgagee should give the tenant notice of the mortgage, and require payment of the rent, and he adds, "and he is entitled as well to rent which has fallen due since the mortgage and remains unpaid to the mortgagor, as to rent accruing due after the notice," and he cites the cases last given and 4 Anne, Chap. 16, Sec. 10; *Pope v. Biggs*, 9 B. & C. 245; *ex parte Hankey v. McBrindley*, 1 M. & M. 24; but until, notice of payment to mortgagor is a full defence." *Pope v. Briggs*, ante. To the cases cited by him may be added, *Johnson v. Jones*, 9 Ad. & El. 809; *Waddilove v. Barnett*, 2 Bing., N. C. 538, and where the mortgage was made before the lease, the mortgagee cannot claim the arrears, *Alchorne v. Gonnue*, 2 Bing. 54; and in the case last named, the lessee having paid such arrears to the mortgagee, prevented his distraining his goods, which he otherwise threatened to do, the lessor distrained, and in replevin brought by the lessor to recover the goods

accruing from a tenant, under a lease made *before* the

distraint, it was held that the distress was lawful, and that payment of the rent to mortgagee did not afford any defence thereto. The statute 4 Anne, chap. 16, and 11 Geo. 2, c. 19, only apply to leases made *before* the mortgage, and are in aid of the mortgagee or reversioner to enable them to distrain without a formal attornment. *Those statutes have no application where the lease was made after the mortgage, and the right of the mortgagee to recover the rents of the tenant of the mortgagor, does not exist. As to rents accruing upon leases made before the mortgage, the right is predicated upon the fact that the mortgage is treated as an assignment of the reversion and of the lease. As to rents accruing under leases made after the mortgage, no such right exists and no recovery can be had by the mortgagor except if he ratifies the tenancy and adopts the tenant of the mortgagor as his tenant, and then only from the time when he so adopted the tenant. The contrary doctrine originated in the remarks of the court in Pope v. Biggs, 9 B & C. 245, where it was held that notice by the mortgagee to the tenant of the mortgagor,—the tenancy having commenced subsequently to the mortgage—to pay the rent to him and payment thereof by the mortgagor, would be a defence to an action brought by the mortgagee, as well as to rents accruing before, as after notice. But the doctrine of this case has been frequently impugned. In Rogers v. Humphreys, 4 Ad. & El., LORD DENMAN intimated a doctrine in opposition to it. "If," said he, "there be a lease, and such lease is prior to the mortgage, the mortgagee has the same rights against the lessee, and those claiming under him, that the mortgagor had, and no other than he had, and his remedy must be on the lease as assignee of the reversion, as long as the lease is in existence, and the tenant acknowledges his title. But if the lease be subsequent to the mortgage, then the mortgagee may treat the lessee and all those who may be in possession as wrongdoers, and may bring an ejectment. But he cannot distrain, or bring*

any action for the rent they have contracted to pay, as there is no relation of landlord and tenant between them, unless they choose to pay the rent to the mortgagee and he accept it." A similar rule was adopted in Partington v. Woodcock, 6 Ad. & El. 690; also in Hughes v. Bucknell, 8 C. & P. 566; Evans v. Elliot, 9 Ad. & El. 342; Higginbotham v. Barton, 11 Ad. & El. 307; Johnson v. Jones, 9 id. 809; Burrows v. Grandin, 1 Dowl. & L. 213; Wheeler v. Banscombe, 5 Q. B. 373. There would seem to be no doubt but that a lease made subsequently to the mortgage is void as against the mortgagee. See also Keech v. Hall, 1 Dougl. 21; Birch v. Wright, 1 T. R. 378, 380; Thunder v. Belcher, 3 East, 439; *ex parte* Wills, 2 Cox, 233. But in Evans v. Elliot, ante, adverting to an argument that the mortgagee might always treat both the mortgagor and all who claimed under him as trespassers, and that, for that reason, the mortgagor's lessee could not become the tenant of the mortgagee under the old lease, LORD DENMAN said, that, though he believed that his learned brothers were disposed to assent to the proposition, he wished to guard himself against being understood to adopt it as universal; for he considered that a mortgagee might so bind himself by his own conduct as to be precluded from treating the mortgagor's lessee as a trespasser; and declared himself by no means prepared to admit that a jury would not be warranted in inferring a recognition of the tenant's right to hold from the mere circumstance of the mortgagee's knowingly permitting the mortgagor to continue the apparent owner of the premises, as before the mortgage, and to lease them out, exactly as if his property in them continued. There is no doubt, however, and if the mortgagee require the rent to be paid to him, and it be paid accordingly, the relation of landlord and tenant may arise between the parties. Pouseley v. Blackman, Cro. Jac. 659; Cro. Car. 304; Higginbotham v. Barton, 11 Ad. & El. 307; Rogers v. Humphreys, 5 Ad. & El. 299; or, at all

mortgage, by giving notice to the tenant of his mortgage

events, the mortgagee may be entitled to sue the tenant for use and occupation. *Higginbotham v. Barton*, ante; *Rawson v. Eick*, 7 Ad. & El. 451. And where the attorney of a mortgagee, who was also attorney of the mortgagor, applied to the tenant in possession under the mortgagor for payment of his rent, in order to satisfy the interest on the mortgage, with a threat of distress in case of non-payment, it was held that the mortgagee could not maintain an ejectment against the tenant as a trespasser, laying the demise at a period anterior to the application. *Whitaker v. Hales*, 7 Bing. 322; though the mere receipt by the mortgagee from the mortgagor of interest on the mortgage will not preclude the mortgagee from ejecting the mortgagor's tenant, declaring on a demise prior to the receipt. *Rogers v. Cadwallader*, 2 B. & Ad. 478. In the case last cited, *LITLEDAL*, J., hinted a doubt as to the propriety of the judgment in *Doe dem. Whitaker v. Hales*, ante; but *LORD DENMAN* subsequently declared, *Evans v. Elliot*, 9 Ad. & El. 343, 355, that, notwithstanding that doubt, the case appeared to him to be well decided. If, after notice and demand, the tenant continue in possession, a jury may fairly infer a new tenancy from year to year between him and the mortgagee, at the old rent. *Brown v. Storey*, 1 M. & G. 117; *Hughes v. Bucknell*, 8 C. & P. 566. But if the judge, not being required at the trial to leave it to the jury to say whether the tenant assented to the new tenancy, omit to do so, the omission cannot support a motion for a new trial on the ground of misdirection. *Brown v. Storey*, 1 M. & G. 117. After such notice and demand, the tenant is justified in paying to the mortgagee as well such rent as may have fallen due since the mortgage, and remain unpaid to the mortgagor, as that which may thereafter become due. This was decided in the case of *Pope v. Briggs*, sup. p. 165, the court considering the mortgagee's demand to be equivalent to an eviction of the tenant by title para-

mount, which, of course, would be an answer to the mortgagor's claim. So, in *Higginbotham v. Barton*, 11 Ad. & El. 307, *LORD DENMAN* said that the mortgagee was entitled to the profits of the land, and that the tenant was right in paying him those profits, whether strictly called rent or not. That, as he might eject the lessee, and afterwards let to him, it seemed absurd to require him to go through the form of an ejectment in order to put the lessee into the very position in which he would stand by paying his rent to the mortgagee. See also similar remarks made by *PARKE, J.*, in *Pope v. Biggs*, 9 B. & C. 250-1. Though the tenant cannot dispute his landlord's (the mortgagor's) title to demise, he may show that such title was defeasible, and that it has been defeated. *Pope v. Biggs*, ante. In the case of *Johnson v. Jones*, 8 Ad. & El. 849, the plaintiff in replevin, to an avowry for rent due in respect of premises held by the plaintiff as tenant to the defendant, pleading, that, before the defendant had anything in the premises, one Ann Griffith, being seized in fee, mortgaged them in fee to J. Clement; that default was made in payment; that the equity of redemption descended to David Griffith, who leased them to the defendant for twenty-one years, who made the demise to the plaintiff mentioned in the avowry; that after the rent became due from the plaintiff as tenant to the defendant, the heir of the mortgagee, to whom the premises had descended, demanded payment thereof from the plaintiff and threatened, in case of non-payment, to put the law in force, wherefore the plaintiff did then necessarily and unavoidably pay the said mortgagee the said sum of 14*l.* so in arrear, "and so the plaintiff says that no part of the said sum of 14*l.* of the said rent was, or is, in arrear, as in avowry," &c. This plea was demurred to, on the ground that it attempted to deny the title of the defendant; that it showed no power in the mortgagee to compel payment, and that it amounted to *riens in arrear*. But it was held

and claim to the rents under it ; and in a late case in Alabama, it was held that this right might be exercised by the second mortgagee unless they have been previously intercepted by the first. But the mortgagor is now

that the plea was not one of *nil habuit*, nor of eviction, but of payment ; that the plaintiff did not deny his holding as tenant to the defendant ; but showed that the lease was made subject to a prior charge, namely, the mortgage, which he was compelled to pay ; and that the facts stated in the plea showed an authority in law justifying payment to a third party. And see *Sapsford v. Flecher*, 4 T. R. 511 ; *Taylor v. Zamira*, 6 Taunt. 524. But where the lease was made *before* the mortgage, it is held in Massachusetts that the mortgagee, when his right to the possession of the premises attaches, may, by notice to the tenant, intercept and claim all the rents since the mortgage remained unpaid, and that parol evidence is not admissible to show that it was agreed that the mortgagor should have them. *Russell v. Allen* (Mass.) 42. And the same rule prevails in several States. *Babcock v. Kennedy*, 1 Vt. 457 ; *Mansory v. U. S. Bank*, 4 Ala. 783 ; *Clark v. Abbott*, 1 Md. Ch. 474. In *Crosby v. Hanlow*, 21 Me. 499, where an agent had been appointed by the mortgagor to collect and receive the rents, it was held that the mortgagee, by notice to the agent, could thus intercept all the rents accruing *subsequent* to the notice. In Vermont, in *Walker v. King*, 44 Vt. 601, it was held that a mortgagee who has never taken possession under his mortgage, but has permitted the assignee of the mortgagor to remain in possession, has no greater claim against him for rents and profits, than he would have against the mortgagor, and it is well settled that he has no claim upon the mortgagor therefor, either at law or in equity. *Ex parte Wilson*, 2 V. & B. 252 ; *Hill v. Bexley*, 20 Beav. 127 ; *Walmsley v. Milen*, 7 C. B. N. S. 115 ; *Moss v. Gallimore*, 1 Doug. 283 ; *Trent v. Hunt*, 9 Exchq. 14 ; *Boly v. Arbuthnot*, 28 L. J. Ch. 547 ; *Cole on Ejectment*, 38, 473. In Georgia, the mortgagor is enti-

tled to all the rents and profits of the land until he is sold out and dispossessed by foreclosure proceedings. *Vason v. Ball*, 56 Ga. 268. In Kentucky, unless the rents and profits are specially pledged, the same rule prevails and the mortgagee cannot claim them as a legal incident of the estate. But a court of equity may, after the debt becomes due, if the property is inadequate to secure the debt, in an action to foreclose the mortgage, appoint a receiver of the rents. But if there is no deficiency, they go to the mortgagor. *Douglass v. Cline*, 12 Bush. (Ky.) 608. In Mississippi, the mortgagor retains the legal title and right of possession until condition broken, and the mortgagee cannot interfere therewith, nor can the mortgagee take the rents and profits unless so agreed. *Myers v. Estell*, 48 Miss. 373 ; *Black v. Payne*, 52 Miss. 271. In North Carolina, the mortgagor is treated as having an equitable freehold. *State v. Ragland*, 75 N. C. 12. In Tennessee, the mortgagee to the extent of the mortgage-debt is *pro tanto* a sale, giving him all the rights of a *bona fide* purchaser. 2 Tenn. Ch. 581. So in Iowa, *Hewitt v. Rankin*, 41 Iowa, 35. In Vermont, after condition broken, he may enter and take possession without previous notice, if he can do so peacefully. *Fuller v. Eddy*, 49 Vt. 11. So in Maine, he may enter and harvest the crops unless the mortgagor is occupying by agreement, as tenant. *Gilman v. Wills*, 66 Me. 271. In Pennsylvania, the mortgagee is treated as having the title and right of possession to hold until payment, and may enter and hold the lands and receive the rents and profits until the mortgage-debt is paid. *Tryon v. Musson*, 77 Penn. St. 250. These conflicting doctrines are all of them, however, applicable only to ordinary mortgages, and the parties may, by special provision, entirely change the respective rights of the parties under the mortgage.

generally treated as retaining both the legal and the equitable title, and the mortgagee as holding only under his mortgage, a lien upon the land for the payment of the debt it is given to secure.¹ Where a lease is made *after*

¹*Carpenter v. Bowen*, 42 Miss. 28; *Trimm v. Marsh*, 54 N. Y. 599; *Fletcher v. Holmes*, 32 Ind. 497; *Buchanan v. Munroe*, 23 Tex. 587; *Williams v. Beard*, 1 S. C. 809; *Johnson v. Houston*, 47 Mo. 227; *White v. Rittmeyer*, 30 Iowa, 268; *Fletcher v. Holmes*, 32 Ind. 497; *Elfe v. Cole*, 26 Ga. 197; *Mack v. Witzler*, 39 Cal. 247; *Priest v. Wheelock*, 58 Ill. 114. Although in form a conveyance in fee upon condition, yet, in effect, even after condition broken, it is a mere security for a debt, and the title reverts without a reconveyance, whenever the debt is paid. *Pease v. Pilot Knob Iron Co.*, 49 Mo. 124, and, before foreclosure, is not subject to levy and sale. *Buckley v. Daley*, 45 Miss. 388. And until condition broken he is entitled to possession, unless otherwise provided in the mortgage, and is in by right by virtue of his title, and not as a tenant at sufferance. *Hooper v. Wilson*, 12 Vt. 695; *Crippen v. Morrison*, 13 Mich. 23; *Kidd v. Temple*, 22 Cal. 255. And if a mortgagee takes a lease of the mortgagor of the same lands, he will be treated as holding under the lease, until he has made his election to hold under the mortgage. *Wood v. Felton*, 9 Pick. (Mass.) 171. And after condition broken he may hold under his mortgagee without first surrendering possession under the lease. *Shields v. Lozeau*, 84 N. J. L. 496. The mortgagor's interest is an estate of inheritance in no wise effected by the mortgage before entry and foreclosure. *White v. Rittmeyer*, 30 Iowa, 268. See *Miner v. Beekman*, 11 Abb. Pr. N. S. (N. Y.) 147; *Norcross v. Norcross*, 105 Mass. 265; *O'Dougherty v. Felt*, 65 Barb. (N. Y.) 220. And even after the debt is due, he is not entitled to the rents and profits unless the security is insufficient. *Myers v. Estell*, 48 Miss. 373. As to the nature of mortgagor's estate, see *Kline v. McGuerkin*, 24 N. J. Eq. 411; *Hill v. Hewett*, 35 Iowa

563; *Trimm v. Marsh*, 54 N. Y. 599; *Annapolis, &c. R. R. Co. v. Gantt*, 39 Md. 115. The mortgage is but a security, and the freehold still remains in the mortgagor. *Jackson v. Willard*, 4 John. (N. Y.) 41. He is seized and is the legal owner. *Orr v. Hadley*, 36 N. H. 575; *Hitchcock v. Harrington*, 6 John. (N. Y.) 290; *Runyan v. Mensereau*, 11 John. (N. Y.) 584. The mortgagee, before condition broken at least, has no estate in the land distinct from the debt. *Aymar v. Bill*, 5 John. Ch. 570. When out of possession he cannot be treated as the proprietor of the estate. *Norwich v. Hubbard*, 22 Conn. 587. It is only a security, and the mortgagee has the same rights to the estate that he ever had, except against the mortgagor. *Wilkins v. French*, 20 Me. 111; *Orr v. Hadley*, 36 N. H. 575. And as against him, until he has legally entered for condition broken. *Kennett v. Plummer*, 28 Mo. 142. Under foreclosure proceedings, or as a judgment of a court of law, or by the consent of the mortgagor. *Hooper v. Wilson*, 12 Vt. 695; *Crippen v. Morrison*, 13 Mich. 23; *Pierce v. Brown*, 24 Vt. 195; *Hill v. Robertson*, 24 Miss. 368; *Pratt v. Skolfield*, 45 Me. 386. LORD MANSFIELD, in the *King v. St. Michael's*, 2 Doug. 681, very clearly defines the relations of the mortgagor and mortgagee to the lands. He says: "A mortgagor in possession gains a settlement, because the mortgagee, notwithstanding the form, has but a chattel, and the mortgage is only security. It is an affront to common sense to say that the mortgagor is not the real owner." In an earlier case, *Martin v. Weston*, 2 Burr. 978, he thus defines the interest covered by a mortgage:—"A mortgage," says he, "is a charge upon the land. And whatever would give the money, will carry the estate in the land along with it, to any purpose. The estate in the land

the mortgage becomes a lien upon the estate, the mortgagor cannot, unless the tenant chooses to attorn to him, and does so, treat him as his tenant under the lease from the mortgagor, and recover the rent of him; because there is, in such a case, no legal privity,* and no reversionary interests therein vests in the mortgagee by virtue of the mortgage;† and, there being no privity of contract, he cannot proceed against the lessee either by action or distress for the rent, as such.‡ But, as the tenant of the mortgagor can take no better title than his lessor had,§ and, as after condition broken in some States¶ and after condition broken and the right of the mortgagee to possession is perfected under foreclosure or other legal proceeding in other States the mortgagor becomes a mere tenant at sufferance to the mortgagee, it follows that the ten-

is the same thing as the money due upon it. It will be liable to debts; it will go to the executors; it will pass by will not made and executed with the solemnities required by the Statute of Frauds. The assignment of the debt or forgiving it, will draw the land after it as a consequence. Nay, it would do it, though the debt was forgiven only by parol." In *Eaton v. Jaques*, 2 Doug. 455, a term for years was assigned by way of mortgage with a clause of redemption, and it was held by the court that the lessor could not sue the mortgagee as assignee of all the estate, right, title, interest, &c., of the mortgagor *even after the mortgage had been forfeited, unless the mortgagee had taken actual possession*. See also, to same effect, *Walker v. Reeves*, 2 Doug. 461 n. 1. In *The King v. Eddington*, 1 East, 288, it was held that the object of a mortgage is merely to secure a debt, and that the legal estate still remains in the mortgagor, and it was held also that the husband of a woman who had an estate in a term for ninety-nine years, but which had been by her and her first husband mortgaged to secure a loan, gained a settlement by a residence upon the estate for forty days, under a statute which enabled a person owning a freehold-estate in a parish, who resided up-

on it for the period of forty days to acquire a settlement therein and the court adopted a rule, as stated by LORD MANSFIELD in *The King v. St. Michael's*, *supra*. See opinion of GROSE, J. The legal estate of the mortgagor is not divested by condition broken or entry therefor by the mortgagee, but he retains such an estate therein that it may be levied upon and sold under execution. *Trimm v. Marsh*, 54 N. Y. 599; *Gorham v. Arnold*, 22 Mich. 247. But *contra*, see *Buckley v. Daly*, 45 Miss. 338. In *Kennett v. Plummer*, 58 Mo. 142, it was held that until after condition broken *and entry* by the mortgagee, the mortgagor continues owner, and may lease the estate, and in every respect deal with it as owner.

¹ *McKircher v. Hawley*, 16 John. (N. Y.) 289; *Partington v. Woodcock*, 5 N. & M. 672; *Watts v. Coffin*, 11 John. (N. Y.) 495; *Rogers v. Humphreys*, 4 Ad. & El. 299. Also see note 2, p. 185.

² *Partington v. Woodcock*, 5 N. & M. 672.

³ *Peters v. Elkins*, 14 Ohio, 344; *McKircher v. Hawley*, 16 John. (N. Y.) 289.

⁴ *Rogers v. Moore*, 11 Conn. 553.

⁵ *Pierce v. Brown*, 24 Vt. 165; *McKinn v. Mason*, 3 Md. Ch. 186; *Pratt v. Skolfield*, 45 Me. 386; *Hill v. Robertson*, 24 Miss. 368.

ant occupies the same position¹ and the mortgagee may immediately dispossess him without previous notice to quit,² unless the mortgagor chooses to treat him as a

¹ Tucker v. Keeler, 4 Vt. 161; Hooper v. Wilson, 11 id. 695; Crippen v. Morrison, 18 Mich. 28; Kidd v. Temple, 22 Cal. 255.

² Keech v. Hall, 1 Doug. 21; Thunder v. Belcher, 8 East, 449. These cases proceed upon the ground that, in the absence of any agreement to the contrary in the mortgage, the mortgagee at once becomes entitled to possession as against the mortgagor, and that the mortgagor *instantly*, upon the delivery of the deed, becomes a mere tenant at sufferance, and consequently cannot make a tenant under him as against anyone except himself, and those having no better rights to the possession, and this doctrine has in effect been held in several of the States. Shute v. Grimes, 7 Blackf. (Ind.) 1; Brown v. Stewart, 1 Md. Ch. 87; Fay v. Cheney, 14 Pick. (Mass.) 390; Furbish v. Goodwin, 29 N. H. 321; Walcap v. McKinney, 10 Mo. 229; Colman v. Packard, 16 Mass. 39; McKinn v. Mason, 3 Md. Ch. 186. He can make no lease or contract respecting the mortgaged premises that shall be effectual to bind the mortgagee. Sweetzer v. Lowell, 38 Me. 446; Cotton v. Smith, 11 Pick. (Mass.) 311; Judd v. Woodruff, 2 Kent (Conn.) 298; and either the mortgagor or a tenant under him under a lease subsequent to the mortgage, may be treated by the mortgagee as a tenant at will, or as a trespasser. Pettingill v. Evans, 5 N. H. 54. But, if the mortgagor reserves the right to remain in possession until after default made, the mortgagee cannot treat him as a tenant and recover for use and occupation. Mayo v. Shattuck, 14 Pick. (Mass.) 525; McKinn v. Mason, 3 Md. Ch. 186. But the doctrine that the mortgagee is entitled to immediate possession of the premises, upon the delivery of the mortgage, was predicated upon the theory that the mortgage conveyed the legal estate in the premises to the mortgagee, and that the mortgagor had only an equitable

estate therein; but this doctrine is now generally ignored in most of the States, and the mortgagor is held to retain both the legal and equitable estate until after condition broken. Carpenter v. Bowen, 42 Miss. 28; Fletcher v. Holmes, 32 Ind. 497; Pease v. Pital Knob Iron Co., 49 Mo. 124; Mack v. Wetzler, 39 Cal. 247; Priest v. Wheelock, 58 Ill. 114; Wilkins v. French, 20 Me. 111; Ellison v. Daniels, 11 N. H. 274; Hitchcock v. Harrington, 6 John. (N. Y.) 295; Hooper v. Wilson, 12 Vt. 695. And in those States where this doctrine is held, as well as in those in which by statute the mortgagor is given the right of possession until after foreclosure and sale, or after the expiration of the decree, where a term of redemption is given, Shaw v. Hoadley, 8 Blackf. (Ind.) 165; Tucker v. Keeler, 4 Vt. 161, the mortgagor may make a lease of the premises that will be valid and binding against the mortgagee, at least until condition broken. Crippen v. Morrison, 18 Mich. 28; Laduc v. Detroit, &c., R. R. Co., 13 id. 380; Hooper v. Wilson, 12 Vt. 695; Elf v. Cole, 26 Ga. 197; Kidd v. Temple, 22 Cal. 255. And in those States where the mortgagor's right of entry does not attach until after the expiration of the term of redemption, until the decree obtained in foreclosure proceedings has expired, Hooper v. Wilson, ante; Kidd v. Temple, ante; if the tenant or the mortgagor remains in possession *after* the decree has expired, he is not liable for rent, unless there is an express or implied promise to pay it, but is a mere tenant at sufferance. Tucker v. Keeler, 4 Vt. 161. Great confusion exists in the decisions of the courts of this country, as well as of the English courts, as to what the real relations of the mortgagor and mortgagee are to the lands covered by the mortgage, but this matter in many of the States is regulated by statute, and the question in a given case can be determined only by reference to the stat-

tenant at will under him, and the tenant assents to such relation,' or unless the mortgagee was privy to the making of the lease by the mortgagor and assented thereto, expressly or impliedly,' or has recognized him as *his* tenant in such a manner that he is estopped from denying the validity of the tenancy.' The lessee of a mortgagor un-

ute of the State in which the land lies, and by the language of the mortgage itself. One thing, however, is certain, that the tenant of the mortgagor, holding under a lease made subsequent to the mortgage, may retain possession as against the mortgagee, or any person claiming under or through him, so long as the mortgagor has any right of possession left to him in the premises, and the rights of the tenant in this respect are to be tested by the rights of the mortgagor.

¹ Sweetzer v. Lowell, 33 Me. 446; Colton v. Smith, 11 Pick. (Mass.) 311; Pettingill v. Evans, 5 N. H. 54.

² Belcher v. Collins, cited by LORD MANSFIELD, in Keech v. Hall, 1 Doug. 21.

³ If a mortgagee has received rent from the tenant of the mortgagor, *as rent*, he cannot afterwards repudiate the tenancy, but such receipt of rent by him will be a good defence to an action of ejectment. Bawman v. Lewis, 13 M. & W. 241; Whittaker v. Hales, 7 Bing. 322. This question arose under the following circumstances: In that case, *the attorney for the mortgagee, who was also attorney for the mortgagor*, applied to the occupier of the land *for rent to pay the interest of the mortgage with*, and threatened to distrain if the rent was not paid. It also appeared that he had received the *rent* from the defendant *four or five times*. He paid the money to the mortgagee to the extent of his interest. The court held that this was an acknowledgment by the mortgagee that the defendant was not a trespasser, and therefore that he could not have been upon the day of the demise. The plaintiff was accordingly nonsuited, and this ruling was sustained upon hearing by the court *in banco*. The principle established by this

case seems to be that there cannot be a trespass where there has been a *permitted and recognized* occupation. Foley v. Wilson, 11 East, 56. Where the mortgagee, knowing that a person is in possession of the mortgaged premises as tenant to the mortgagor, demands and receives from him out of the rents due to the mortgagor the interest upon his mortgage, or where he receives money from him "*eo nomine* as interest, the tenant being required to pay it to him instead of rent to the mortgagor." TINDAL, C. J., in Whittaker v. Hales, ante, there is no doubt that he is estopped from treating the tenant as a trespasser. But, although the mortgagee has permitted the mortgagor to remain in possession and has regularly received from him the interest accruing upon the mortgage, this fact does not establish the relation of landlord and tenant between the mortgagor and mortgagee, or estop the mortgagee from maintaining ejectment or trespass against a tenant of the mortgagor, or against the mortgagor himself. Rogers v. Cadwallader, 2 B. & Ad. 473. The case of Partridge v. Bere, 5 A. & Ald. 604, is sometimes cited as opposed to this doctrine; but there is no conflict between the doctrine of this and the case last cited. In that case an action was brought by the mortgagee against the defendant for diverting a water-course. It was objected that the relation of landlord and tenant did not exist between a mortgagor and mortgagee. It was also shown that the mortgagor had regularly paid the interest, but this latter point does not seem to have been regarded by the court. It was held by the court that the mortgagor was in possession as tenant by sufferance, and consequently that he was a tenant in the strictest sense. But, notwithstanding

der a lease made *before* the mortgage was executed, by remaining in possession after condition broken, *and notice* from the mortgagee to pay the rent to him, is treated as having assented to continue in, as tenant of the mortgagee, if not under the old lease, at least as tenant to him upon the same *terms*.¹ But by giving notice to the tenant to pay the rent to him, the mortgagee cannot compel the tenant to remain in possession as his tenant upon the terms of the old lease. The tenant may undoubtedly, upon the receipt of such notice, unless the lease has been assigned to the mortgagee, or under the circumstances he is to be treated as assignee, give up possession within a reasonable time, and by so doing cannot be liable either to the mortgagor or mortgagee for a breach of his covenants. After such notice and demand, the obligation of the tenant to pay the rent to his lessor ceases, unless the claim set up by the mortgagee is unfounded, and payment of the rent by him to the mortgagee is an answer to an action brought by the mortgagor, as assignee of the reversion.² The mortgagee

the loose talk of judges and of law-writers, to the effect that the mortgagee is tenant to the mortgagor, or is his agent, *it is clear that the mortgagor in possession is not a tenant at all*. He is in possession as of right, and under a legal and equitable title, until after default made, and such is now the doctrine held by the English courts. *Hickman v. Machin*, 7 H. & N. 722. *If the mortgagor is entitled to possession*, as he is, after condition broken, at least, according to the doctrine of our courts; except when provision is otherwise made by statute, as stated in a previous note, page 191, there would seem to be no question but that from the time when the mortgagee's right of entry accrues he may undoubtedly treat the mortgagor as a trespasser or as a tenant at his election. *Pettingill v. Evans*, 5 N. H. 54; but, before entry by the mortgagee, the law will not imply a promise on the part of the mortgagor to pay rent. *Mayo v. Shattuck*, 14 Pick. (Mass.) 525. Nor

until such election is made, can the mortgagor be treated as a tenant. *McKinn v. Mason*, 3 Md. Ch. 186; and unless entry is made by the mortgagee, or action brought to recover possession within the periods provided by law, his right will be barred. *Lord v. Morris*, 18 Cal. 482; *Haskell v. Bailey*, 22 Conn. 569. But this rule does not apply if the mortgagee is in possession, although he has not brought foreclosure proceedings to perfect his right within the statutory period. *Hall v. Fuller*, 7 Vt. 106, and in equity, unless the statute clearly applies to this class of securities, will foreclosure proceedings be barred by the statute. *Michigan Ins. Co. v. Brown*, 11 Mich. 265; *Union, &c., Co. v. Murphy & Co.*, 22 Cal. 620.

¹ *Brown v. Story*, 1 M. & G. 114.

² *Smith v. Taylor*, 9 Ala. 633; *Weidner v. Foster*, 2 P. & W. (Penn.) 23. *The Mass. Life Ins. Co. v. Wilson*, 10 Met. (Mass.) 126; *Myers v. White*, 1 Rowle (Penn.) 355.

cannot maintain trespass or ejectment against him, because his right is prior to that of the mortgagee, and if he has taken the premises under a lease for a long term and in good faith paid the lessor for the full term in a gross sum, the mortgagee takes only the reversion, and cannot enter until his term expires.¹ But, a tenant under a lease made *after* the mortgage, although he has paid the lessor in advance for the full term, is nevertheless liable to the mortgagee for all rents that accrue *after his right of entry attaches, and notice has been given that the rent must be paid to him.*² Thus in the case last cited, the tenant took a lease of mortgaged premises for a term of years, and made an advance to the lessor, to be expended in improvements upon the estate, which was done. The mortgagee subsequently, before his term had expired, and before the rents had liquidated the advance, brought ejectment against the tenant and obtained a judgment against him. It was held that the mortgagee was not liable to him for the improvements made upon the premises, although he had reason to believe that, under the terms of the mortgage, the mortgagor had a right to execute such a lease. Where a tenant, whether under a lease made before or after the mortgage, is sued by the mortgagor for the rent, he cannot defend by setting up a notice from the mortgagee to pay the rent to him; *he must, in order to defend, have paid the rent in compliance with the notice.*³ Mere notice by the mortgagee is not sufficient to determine the contract.⁴ The rule is, that a tenant under a lease made by a mortgagor either *before* or *after* the mortgage, may, without prejudice, pay rent to the mortgagor, until he receives notice

¹ Jones v. Thomas, 8 Blackf. (Ind.) 428; Wilder v. Houghton, 1 Pick. (Mass.) 87; Carvis v. McClavy, 5 N. H. 530; Hanshaw v. Willis, 9 Humph. (Tenn.) 568.

² Haven v. Boston, &c. R. R. Co., 8 Allen (Mass.) 369. If an owner of land, after conveying it in mortgage, leases it, and the mortgagee, after an entry for breach of condition of the mortgage brings a writ of entry against the lessee to recover possession of the land, to

which the lessee files a plea of *nul disseizin*; the lessee is not estopped by the lease to contest the defendant's title, if he has not attorned to him, or been compelled to pay rent to him. Holmes v. Turner's Falls Co. 142 Mass. 590.

³ Witton v. Dunn, 17 Q. B. 294; Wheeler v. Branscombe, 5 Q. B. 373; Hickman v. Machin, 7 H. & N. 716.

⁴ WATSON, B., in Hickman v. Machin, ante.

from the mortgagee to pay to him.' In England it is held that after such notice, where the lease was made prior to the mortgage, the mortgagee may distrain not only for the rent accruing subsequent to the notice, but also for all arrears that accrued before; that is, that the notice divests the mortgagor of all interest in *any* of the rent remaining unpaid when notice is given.' But in our courts it is not believed that the mortgagee can claim any rents, except such that accrue subsequently to the notice,' and in any event it would seem that he could recover no arrears, except such as accrued *subsequent* to the time when his right of entry attached. The English cases holding the doctrine previously stated, proceed upon the ground that, under the peculiar form of mortgages employed, the mortgagor is *instantly*, upon the delivery of the mortgage, entitled to possession; and where by the terms of the mortgage such are the rights of the mortgagee, it is possible that he might by notice, intercept the rent in arrears at the time when it was given, as well as that accruing subsequently thereto,' although a different doctrine is intimated by PATTERSON, B.,⁶ in the case referred to. He says, "I cannot comprehend how a right of action for rents *already due*, should be vested in the mortgagor *before* the notice, and the notice should undo that vested right of action, and set up in lien of it, a right of action in the mortgagee. It has been so held,' but that case is beyond my comprehension," and in a previous paragraph he says, "I think it a grave question, whether the latter is not a fallacy."⁷ In all cases, the question

¹ Trent v. Aunt, 9 Exchq. 14; Smith v. Taylor, 9 Ala. 633; Weidner v. Foster, 2 P. & W. (Penn.) 23; Life Ins. Co. v. Wilson, 10 Met. (Mass.) 126; Carvis v. McClavy, 5 N. H. 580; Jones v. Thomas, 8 Blackf. (Ind.) 428; Field v. Swan, 10 Met. (Mass.) 112.
² Moss v. Gallimore, 1 Doug. 279; Burrows v. Graddin, 1 D. & L. 218; Rogers v. Humphreys, 4 Ad. & El. 299.

³ Hatch v. Dwight, 17 Mass. 289;

Wilder v. Houghton, 1 Pick. (Mass.) 87; Field v. Swan, 10 Met. (Mass.) 112. But see Russell v. Allen, 12 Allen (Mass.) 42.

⁴ Opinion of BRAMWELL, B., in Trent v. Hunt, 9 Exchq. 21.

⁵ Hutchinson v. Dearing, 20 Ala. 790; Latimer v. Moore, 4 McLean (U. S.) 110.

⁶ Wilton v. Dunn, 17 Q. B. 800.

⁷ In Waddilove v. Barnett, 2 N. C. 538.

⁸ Referring to the doctrine of

as to whether such right on the part of the mortgagor exists or not, will depend upon the terms of the mortgage, and the provisions of the statute in the State in which the land is situated. A mortgagee, who has never been in actual possession, cannot maintain trespass against the lessee of the mortgagor, nor can he waive the tort, and maintain an action for the use and occupation of the land,¹ but if, *after* notice from the mortgagee the tenant remains in possession, from this fact,—unless possibly there are facts to rebut it—the law implies a promise on the tenant's part to pay him for the use of the premises;² and under some circumstances it has been held that, although not entitled to recover them as rent, he can, nevertheless, recover the rents, issues, and profits.³ When a lease is given by a mortgagor, if the mortgage is foreclosed before the term expires, the presumption is that the lessee sustains no damage, the rent being an equivalent for the use. If damages are claimed the burden is upon the tenant to show them.⁴

SEC. 124. *When tenant not entitled to crops.*—A lessee who goes into possession under a lease subsequent to the

Waddilove v. Barnett, ante, and to that portion of Mr. Smith's note to Moss v. Gallimore, 1 Sm. Leading Cas. 2d Ed. 317, in which he reiterates the doctrine of that case.

¹ Turner v. Steam Coal Co., 5 Exchq. 932; Mayo v. Shattuck, 14 Pick. (Mass.) 533; Watts v. Coffin, 11 John. (N. Y.) 495. But see Wheeler v. Bates, 21 N. H. 460, where it is held that the mortgagee may treat any person found in possession of the mortgaged premises as a wrong-doer or disseizor, at his election.

² Standen v. Christmas, 10 Q. B. 135; Waddilove v. Barnett, 2 Bing. N. C. 538. The mortgagee who enters for condition broken, and orders the tenant to pay the rent to him, is entitled thereto as against the mortgagor, although his entry is not effectual for the purpose of foreclosure. Stone v. Patterson, 19 Pick. (Mass.) 476.

³ Hill v. Jordan, 30 Me. 337; Life Ins. Co. v. Wilson, 10 Met. (Mass.) 126. In Haven v. Adams, 8 Allen

(Mass.) 363, it was held that if, during the pendency of an action to foreclose a mortgage of land, the mortgagor leases and delivers possession of a portion of the mortgaged premises to a tenant, who retains the actual possession thereof under a claim of right, by virtue of certain provisions of the mortgage, after formal possession has been delivered to the mortgagee upon the execution recovered in his suit, and it is afterwards adjudged, in a writ of entry brought to try the title, that the mortgagee is entitled to possession as against such tenant, he may recover damages for rents and profits from the time when the formal possession was delivered to him, and is not limited to the time of the commencement of his action. But see Witton v. Dunn, 17 Q. B. 294, where this right is questioned.

⁴ Larkin v. Misland, 100 N. Y. 212.

mortgage, is not, as against the mortgagee, after his right of entry has attached, entitled to the growing crops, and the mortgagee or any other person who becomes entitled thereto, either under a sale, or under a decree of foreclosure, may maintain trespass against the lessee for taking and carrying them away.¹

SEC. 125. **Mortgagor and mortgagee should join in lease.**—From what has already been said, it will be seen that in order to protect a tenant under a lease for a term that is made subsequent to a mortgage of the premises, both the mortgagor and mortgagee should join in the lease,² and the covenants of the lessee should be made with the mortgagee, with a view to running with the land, and the proviso for re-entry should be reserved to the mortgagee, and not to the mortgagor, with such other provisions as to quit enjoyment and payment of rent, as are essential to protect the lessee in his term, from the conflicting claims of either.³

SEC. 126. **Lease by Mortgagee.**—A mortgagee cannot make a lease of the premises that will not be liable to be defeated by the mortgagor until he has perfected his right by foreclosure proceedings.⁴ But if he enters for

¹ Lane v. King, 8 Wend. (N. Y.) 584; Walmsley v. Milne, 7 C. B. N. S. 115.

² Frankslinks v. Bull, 34 L. J. Ch. 153; Hughes v. Bucknett, 8 C. & P. 566; Carpenter v. Parker, 3 C. B. N. S. 206; Burney v. Adams, 2 C. & J. 232.

³ Webb v. Russell, 3 T. R. 398; Russell v. Stokes, 1 H. Bl. 562; Saunders v. Merryweather, 3 H. & C. 902.

⁴ Stone v. Patterson, 19 Pick. (Mass.) 476; Hughes v. Bucknall, 8 C. & P. 566; Carpenter v. Parker, 3 C. B. (N. S.) 232; Prior v. Ongley 10 C. B. 25. In Comer v. Sheehan, 74 Ala. 452, a tripartite agreement between the landlord, his creditor and the tenant or lessee, by which the latter assumes the landlord's pre-existing debt to the amount of the stipulated rent for the year, executing to the creditor his negotia-

ble promissory notes secured by mortgage, which the creditor accepts in satisfaction *pro tanto* of the landlord's indebtedness to him, entering a credit as for a partial payment, operates on the principle of novation and substitution and effects an extinguishment of the original debts between the parties.

As against all the world except the mortgagee and those claiming under him, the mortgagor is regarded as the owner of the mortgaged property, and has the right to convey or lease them subject to the mortgage; and he is entitled to the rents and profits even after the law day and default made, until they are intercepted by some active assertion of claim on the part of the mortgagee, either by notice to the tenant in possession, or by bill in equity to foreclose.

Under a mortgage of lands which

condition broken, as he may do, unless restricted by statute or by the terms of the mortgage, a lease made by him would be good until the mortgagor redeems the premises from the mortgage-debt, or that part of it which was due at the time of entry.¹ But until entry or suit brought to recover possession for condition broken, he can make no lease that will give his lessee the right to exclude the owner of the equity of redemption, or a tenant under him from the premises.² The mortgagee of a leasehold estate, for years, may secure a renewal thereof, whether the lease expired before renewal or not, but the renewal will inure to the benefit of the mortgagor, subject to the mortgagee's expenses in the matter.³ The mortgagee cannot, therefore, make a lease for years, of property in mortgage, that will be operative against the mortgagor, until after he has forfeited his rights by foreclosure proceedings, unless, perhaps, to avoid an apparent loss, and merely of necessity.⁴ If a mortgagee accepts a tenant of the mortgagor as his tenant, such tenant becomes merely a tenant from year to year to the mortgagee, subject to such of the terms of the lease as are applicable to such tenancy.⁵ But, it seems that pay-

are subject to an outstanding lease, the mortgagee is regarded as the assignee of the reversion and is entitled to the rents past due and unpaid as well as those afterwards accruing, though the tenant is justified in paying them to the mortgagor, until they are intercepted by notice or proper legal proceedings; but, when the lease is made by the mortgagor after the execution of the mortgage, it is not binding on the mortgagee who may annul it at pleasure and eject the lessee as a trespasser; and he cannot treat the lessee as his tenant by merely giving him notice to pay rent.

When a mortgagee becomes the purchaser at his own sale under a power in the mortgage, the sale is valid as between the parties, notwithstanding the Statute of Frauds, unless set aside within two years; and if the land is in the possession of a tenant under a lease executed by the mortgagor subsequent to

the mortgage, statutory notice to him by the mortgagee, as such purchaser, "vests" in him the right to the possession in the same manner as if such tenant had attorned to him (Code 2878) but while he may possibly thereby acquire a right to maintain an action for future use and occupation, he cannot recover rents past due and unpaid, which the mortgagor had already transferred to another.

¹ Silloway v. Brown, 12 Allen (Mass.) 30.

² Moore v. Titman, 44 Ill. 367.

³ Powell on Mortgages, 188; Hungerford v. Clay, 9 Mod. 1; Franklin v. Ball, 34 L. J. Ch. 153.

⁴ Carpenter v. Parker, 3 C. B. N. S. 232; Hughes v. Bucknell, 8 C. & P. 566; Prior v. Ongley, 10 C. B. 25; Davenish v. Moffatt, 15 Q. B. 257; Thomson v. Amey, 12 Ad. & El. 476.

⁵ Evans v. Elliott, 9 Ad. & El. 342.

ment of the rent does not relate back to the date of the service of notice of the mortgage so as to make the new tenancy commence from that time,¹ but for the purposes of a notice to quit, the new tenancy will be taken to have commenced from the same date as the original term.² Where a tenant attorns expressly as from a previous specified day, a distress may be made for rent calculated from that day.³ When a new tenancy is created by an attornment to the mortgagee, the latter is thenceforth the landlord, and may sue or distrain for the rent, or bring an action for use and occupation,⁴ but, until after the usual notice to quit is given, he cannot maintain ejectment.⁵

SEC. 127. *Effect of a covenant to permit the mortgagor to take rents, &c.*—If a mortgagee covenants that the mortgagor shall take the profits till default in payment, or that the mortgagor and his heirs shall take the profits; in the one case the mortgagor, and in the other his heir after his death, shall be tenant at will;⁶ but in case of the death of the mortgagor, the tenancy at will seems to be determined, till there is a receipt of interest from the heir, which seems to make him also then tenant at will to the mortgagee.⁷ If the mortgagee covenant that he will not take the profits till default in payment, and the mortgagor retains possession, he shall not be tenant at will, but only on sufferance; for it was not agreed that *he* should take, but that the mortgagee should *not* take.⁸ So if a mortgage be made with a proviso that the mortgagee, his heirs and assigns, “shall not intermeddle with the actual possession of the premises, or perception of the rents,” until default of a payment, the mortgagor is a tenant on sufferance, and not a tenant at will, as he would have been on a covenant that *he* should take the profits till

¹ Collins v. Weller, 7 T. R. 478.

² Gladman v. Plumer, 15 L. J. Q. B. 80.

³ Brown v. Storey, 1 M. & G. 117; Rogers v. Humphrey, 4 Ad. & El. 299.

⁴ Lord Downe v. Thompson, 9 Q. B. 1037.

⁵ Pole v. Davis, 1 F. & F. 284; Cole on Ejectment, 474, 477; Lord Downe v. Thompson, ante.

⁶ Com. Dig. Estates (H. 1); Archer v. Dalby, Cro. Jac. 660.

⁷ Bac. Abr. tit. Mortgage (A.).

⁸ Com. Dig. tit. Estate (H. 2).

default for payment.¹ A mortgage indenture after a power of sale on non-payment of the mortgage money contained a covenant by the mortgagee that there should be no sale or notice of sale, nor means taken for obtaining possession until a year after notice thereof to the mortgagor: the mortgagee also covenanted for quiet enjoyment by the mortgagor or his tenant at will, on payment of a yearly rent; it was held, that under this deed the mortgagor was tenant at will only to the mortgagee, and that no tenancy from year to year was thereby created.² An estate was mortgaged in fee, with the usual proviso for redemption, on payment, in June, 1834, and it was also provided that the mortgagee should not call in the principal money until December, 1840, if the interest were regularly paid; and there was a covenant that the mortgagor should hold, occupy and enjoy the estate until default in payment of the principal or interest as aforesaid: it was held, that this operated as a lease to the mortgagor until December, 1840.³ A tenant for years, of a house, demised it by way of mortgage to hold from thenceforth, subject to the proviso after named; and he also sold and transferred the fixtures and some chattels to the mortgagee, also subject to the proviso after named; the deed contained a proviso for reconveyance on payment of the money on a certain day, and also a proviso that, on non-payment, the mortgagee might enter upon and receive the rents, and sell the premises, and also the fixtures and chattels; it was held, that the mortgagee's right to take possession did not attach until the day on which the money was to be paid, and that therefore he could not maintain an action of trespass previously.⁴ But where a person demised premises, to hold from thenceforth for a term, provided that if the lessee paid a certain sum and interest a year after, then that the demise should be void, provided also,

¹ Powseley v. Blackman, Cro. Jac. 659.

² Dixie v. Davis, 7 Exchq. B 89.

³ Wilkinson v. Hall, 3 Bing. N. C. 508; Lyter v. Goldwin, 2 Q. B.

143; Roylance v. Lightfoot, 8 M. & W. 553; Parsley v. Day, 2 Q. B. 147.

⁴ Wheeler v. Montefiore, 2 Q. B. 133; but see Parsley v. Day, *supra*.

that upon default the lessee might sell ; and there was a *covenant* by the lessor for payment of principal and interest, and that at any time after default it should be lawful for the lessee to enter, and from thenceforth to hold the premises and take the rents ; it was held, that the lessee might take possession immediately and before default.¹

SEC. 128. *Liabilities of a mortgagee in possession.*—A mortgagee in possession is not obliged to lay out money any further than to keep the estate in necessary repair ; but on a bill to redeem he will be made to account for all loss and damage occasioned by his gross negligence in respect of bad cultivation and non-repair.* He will also be charged, not only for all rents received, but also for all rents which but for his wilful neglect or default he might have received.* A mortgagee in possession has been held not chargeable as for willful default in declining to defend an action of replevin brought by the owner of goods distrained on the premises by such mortgagee.* If he has expended any sum in supporting the right of the mortgagor to the estate, where his title has been impeached, the mortgagee may certainly add that to the principal of his debt ; and it shall carry interest. Where a mortgagee has been put to expense in defending the title to the estate, the defence being for the benefit of all parties interested, he is entitled to charge such expenses against the estate ; but if his title to the mortgage only is disputed, the costs of his defence should not be borne by the estate, as against parties interested in the equity of redemption, unless they can be shown to have concurred or assisted in the litigation.* If the estate lays at such a distance that the mortgagee *must* employ an agent to collect the rents, what he pays to the agent shall be allowed ; but not where he does or may receive the rents himself. It is the settled practice in the Court

¹ Rogers v. Grazebrook, 8 Q. B. 895. don v. Brandon, 10 W. R. 287.

² Wragg v. Denham, 2 Y. & C. 117 ; Fisher, §§ 901—909.

³ Fisher, §§ 873, 894, 895 ; Brand-

⁴ Cocks v. Gray, 1 Giff. 77.

⁵ Parker v. Watkins, 1 Johns. 133.

of Chancery not to take an account against a mortgagee in possession with annual rents, where, at the time of his entering into possession, there is an arrear of interest.¹ A mortgagee of leaseholds may take possession, even where there is no arrear of interest due, under circumstances which may not render him liable to account with annual rents; as where he enters in order to prevent a forfeiture for non-payment of ground rent or for non-insurance.² The Court of Chancery will not suffer, in a deed of mortgage, any stipulation to prevail, that the estate should become an absolute purchase in the mortgagee upon any event whatsoever.³ A court of common law has no power to compel a reconveyance of a mortgaged estate after payment of the mortgage-debt, interest and costs.⁴

¹ *Nelon v. Booth*, 3 De G. & J. 119.

² *Patch v. Wild*, 30 Beav. 99.

³ *Bonham v. Newcomb*, 1 Vern. 8, 232; *Toomes v. Conset*, 3 Atk.

261; *Vernon v. Bethell*, 3 Eden, 110; *Fisher*, § 126; *Powell on Mortgages*, 116 a, note (H.).

⁴ *Gorely v. Gorely*, 1 H. & N. 144.

CHAPTER XIX.

LEASES BY AGENTS.

- SEC. 129. By an Agent.
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SECTION 133. By an agent.—A lease made by an agent, who acts under a power of attorney authorizing him to do so, either expressly or by necessary implication, effectually binds the principal,¹ and an *agreement* for a lease, made by him within the scope of his power, would be specifically enforced against the principal.² If the lease or agreement is to be or is under seal, and is to be executed by the agent, the instrument empowering him should also be under seal.³ But authority to make a parol lease, or to make an agreement for a lease under seal that is to be executed by the principal, need not even

¹ Hamilton v. Clanricarde, 1 Bro. P. C. 341; Ridgeway v. Wharton, 3 De G. M. & G. 677; Cornfoot v. Fowke, 6 M. & W. 358; Fuller v. Wilson, 3 Q. B. 58 reversed 3 id. 68. See also id. 1009.

² Brillhart v. McConnell, 25 Ill. 476.

³ 3 Bacon's Abr. Tit. Leases, 408; Harrison v. Jackson, 7 T. R. 207; Steightz v. Eggington, Holt N. P. 141; Harshaw v. McKesson, 65 N. C. 688; Cooper v. Rankin, 5 Binn. (Penn.) 612; Blood v. Goodrich, 9 Wend. (N. Y.) 68; Rose v. Ware, 30 Ga. 278; Cain v. Heard, 1 Coldw.

(Tenn.) 173; Shuetze v. Bailey, 40 Mo. 69; Smith v. Perry, 20 N. J. L. 74; Banorgue v. Havey, 5 Mass. 11; Moss v. Worthing, 4 Ill. 26; Wheeler v. Nivins, 34 Me. 45; Rhodes v. Loutham, 8 Blackf. (Ind.) 413; King v. Brooks, 9 Ired. (N. C.) L. 218; Gordon v. Bulkley, 14 S. & R. (Penn.) 331; McMenty v. Frank, 4 T. B. Mon. (Ky.) 35; but where a seal is not essential to the validity of the contract or instrument, it may be rejected as surplusage, and the instrument will be treated as a simple contract. Long v. Hartwell, 34 N. J. L. 116.

be in writing.¹ If the agent exceeds his authority, the lease will be invalid as against the principal, but the agent himself becomes personally liable thereon.² But even though an agent exceeds his authority, or even though in the first instance he acts without any authority whatever, and executes a lease under seal in the name of the principal, the principal may ratify and confirm his acts and give validity thereto as against himself, the same as though the act had been done under competent authority in the first instance,³ but in order to operate as a valid instrument against third persons, and thus fully protect the lessor, it is necessary that the authority should be under seal, or that it should be subsequently ratified by the principal, in writing under seal,⁴ or at least that there should be a clear and express ratification or facts and circumstances equally clear and undisputed from which it can be implied,⁵ and upon the principle that, where a principal enjoys the benefits and fruits of an agent's acts, *knowing what he has done*, he shall be bound thereby, there would be no question but that a receipt of rent from a tenant, under a lease made by an agent, without authority, would amount to a ratification *that would bind the principal*, even though not operative against third persons.⁶ If a lease is executed by an agent,

¹ Brown v. Eaton, 21 Minn. 409; Coles v. Trecothick, 9 Ves. 250; Dyas v. Cruise, 2 Jan. & Lat. 451; Clinan v. Cooke, 1 Sch. & Lef. 22; Champ- lin v. Parish, 11 Paige Ch. (N. Y.) 406; 1 Sugden's Vendors, 186.

² Hamilton v. Clanricarde, 5 Bro. P. C. 547; Fenn v. Harrison, 3 T. R. 758. But where an agent acts in good faith and discloses his real authority, the fact that he executes a lease in excess of his authority will not make it personally binding upon him. It is only when he professes to have a power that he does not in fact possess, that he is liable. If the party who contracts with him knowing the facts, takes a contract in excess of his authority, he must suffer the consequences himself. Sinclair v. Jackson, 8 Cow. (N. Y.) 543.

³ Adams v. Power, 52 Miss. 828;

Irons v. Rayburn, 11 Ark. 378; Haynes v. Seachrist, 13 Iowa, 455; Wisconsin Bank v. Mortley, 19 Wis. 62; Bragg v. Fessenden, 11 Ill. 544; Goodell v. Woodruff, 20 Ill. 191; Overby v. Overby, 18 La. An. 546; Odiorne v. Maxey, 13 Mass. 178; Baines v. Burbridge, 15 La. An. 625; Powell v. Gosson, 18 B. Mon. (Ky.) 179; Breithaupt v. Thurmond, 3 Rich. (S. C.) 216; Hall v. Vanness, 49 Penn. St. 457.

⁴ Pollard v. Gibbs, 55 Ga. 45.

⁵ Wisconsin Bank v. Mortley, 19 Wis. 62; Haynes v. Seachrist, 13 Iowa 455; Roby v. Cossitt, 73 Ill. 638.

⁶ Low v. Conn. & C. R. R. Co., 46 N. H. 284; Ruggles v. Washington County, 8 Mo. 496; Reid v. Hibbard, 6 Wis. 175; Hastings v. Bangor House, 18 Me. 436.

under seal, in the presence of the principal and with his knowledge, no other authority is necessary ;' and if he subsequently ratifies a lease made by his agent, which is invalid in a court of law for want of a seal or other informality, a court of equity will compel him to ratify and confirm it as a valid instrument by attaching a seal thereto, or doing any other act requisite to give it validity as a legal instrument,' a court of equity having ample power to reform any instrument so as to make it express and effectuate the real intention of the parties,' and in order to ascertain and carry out their intention, it will look at the whole transaction and the situation of the parties at the time of its execution, as well as at their acts since.' In order to make out a ratification by the principal, from his acts, it must appear that they were done with knowledge of all the material facts,' and his failure to repudiate the lease within a reasonable time, after informed of its terms, would be construed as an acquiescence.' At all events, whenever an agent executes a deed, lease or other instrument under seal, without competent authority, the principal may adopt and ratify it by a re-delivery thereof, or any act tantamount thereto.' The authority of an agent, if disputed, must be proved by the party seeking to avail himself of his acts,'

¹Gardner v. Gardner, 5 Cush. (Mass.) 483.

²Story on Agency, Sec. 49.

³White v. Denman, 16 Ohio, 59; Webster v. Harris, 16 id. 490; Bushby v. Littlefield, 81 N. H. 193; Ward v. Camp, 28 Ga. 74; Tisson v. Ins. Co., 40 Mo. 83.

⁴Frink v. Cole, 10 Ill. 839; Clapton v. Martin, 11 Ala. 187; Mosby v. Wall, 23 Miss. 81; Hook v. Craighead, 32 Mo. 405; McKay v. Simpson, 6 Ired. (N. C.) Eq. 452; Kent v. Manchester, 29 Barb. (N. Y.) 595; Lankins v. Biddle, 21 Ala. 252.

⁵Seymour v. Wyckoff, 10 N. Y. 213; Mapp v. Phillips, 32 Ga. 72; Dickinson v. Conway, 12 Allen (Mass.) 487; Fletcher v. Dysart, 9 B. Mon. (Ky.) 413; Tidrick v. Rice, 13 Iowa, 214; Burgess v. Harris, 47 Vt. 322; Meehan v. Forrester, 52 N. Y. 277; Chapman v. Lee, 47

Ala. 143; Hammond v. Hannin, 21 Mich. 374; Wright v. Burbank, 64 Penn. St. 247; Gulick v. Grover, 33 N. J. L. 463; Vincent v. Rather, 81 Tex. 77; Drakeley v. Gregg, 8 Wall. (N. S.) 242; Williams v. Storms, 6 Coldw. (Tenn.) 203. But acts done in ignorance of material facts cannot amount to a ratification. Lester v. Kinne, 37 Conn. 9.

⁶Kenior v. Kimble, 26 La. An. 713; Farwell v. Howard, 26 Iowa 381; Searing v. Butter, 69 Ill. 575; Whitehead v. Wells, 29 Ark. 99; Mining Co. v. Bank, 2 Col. T. 248; Bredin v. Dubarry, 14 S. & R. (Penn.) 27; Hawkins v. Large, 23 Minn. 557; Mayer v. Morgan, 51 Miss. 21; Saveland v. Green, 40 Wis. 431; Kelsey v. Bank, &c., 69 Penn. St. 426.

⁷Tupper v. Faulkes, 9 C. B. (N. S.) 797; Sheppard's Touchstone, 57.

⁸Turner v. Hutchinson, 2 F. &

and this may be done by proving express authority, or by showing a state of facts from which authority may be implied, or by showing that the principal has ratified his acts.¹ If a person relies upon the apparent authority of an agent, he is bound to know the extent of such apparent authority, and if he seeks to avail himself of acts in excess thereof, he must either show that the agent has done similar acts in excess of his apparent authority, which were subsequently ratified by the principal,² or that this particular act was ratified by him either expressly or by fair implication. *Prima facie*, a person having merely the care and oversight of lands, as a steward or land agent, has no authority to bind his principal either by a contract for a lease, or by a lease, and if his authority in that respect is relied upon, and is questioned by the principal, it must be established by competent proof.³ In an English case,⁴ it was held that a person who had authority to let from year to year on *usual* terms, and receive rents, derives no implied authority from such circumstances, to let upon *unusual* terms, or to make any special stipulations, without the express authority of the principal; and an agent employed to let a house, does not *necessarily* have an implied authority to let a person into possession.⁵ If the landlord, however, has delivered the keys of the house to the agent, from this circumstance, authority to let into possession might be implied, and in any event but slight evidence would be necessary to prove that he had express authority.⁶ A person having authority merely to collect rents, and look after the estate, cannot be treated as having an implied power to lease the premises for a

F. 185; *Ridgway v. Wharton*, 6 B. L. Cas. 238; *Blore v. Sutton*, 3 Mor. 237; *Firth v. Greenwood*, 1 Jur. N. S. 806.

¹ *Frailey v. Waters*, 7 Penn. St. 221; *Damon v. Granby*, 2 Pick. (Mass.) 345; *Odiorne v. Maxey*, 13 Mass. 178; *Richards v. Folsom*, 11 Me. 70.

² *Tibbitts v. Moore*, 19 N. H. 369.

³ *Chamberlain v. Collinson*, 45 Iowa, 429.

⁴ *Morlat v. Lyons*, 8 Ir. Ch. 112; *Ridgway v. Wharton*, 6 H. L. Cas. 238; *Collun v. Gardner*, 21 Beav. 540; *Gybson v. Searls*, Bro. Jac. 84, 176.

⁵ *Turner v. Hutchinson*, 2 F. & F. 185.

⁶ *Slack v. Crowe*, 2 F. & F. 59.

⁷ *Ibid.*

term, but it would seem that he may lease them at will without any special authority, because, having to answer for the rents to his principal, the principal might sustain great prejudice, if the agent might not lease at will.¹

SEC. 130. *How should be executed.*—An agent leasing an estate for his principal, whether under verbal authority, or by power of attorney, should execute it in the name of his principal, as “John Doe, by Richard Roe, his agent,” or “his attorney,” and if he executes it in his own name, as “Richard Roe, Agent for John Doe,” or “attorney for John Doe,” no interest in the premises passes under the lease.² The form of the execution is not material, if it is really executed in the name of the person giving the authority.³ Thus a lease or other in-

¹ Woodfall's L. & T. 63; Shopland v. Rydler, Cro. Jac. 55; Gylson v. Searls, Cro. Jac. 84, 176.

² The addition to the name is treated as a mere *descriptio personæ*, and evidence is not admissible to show that it was intended to bind the principal named. Kleckner v. Klapp, 2 W. & S. (Penn.) 44; Robertson v. Pope, 1 Rich. (S. C.) 501; McBean v. Morrison, 1 A. K. Mar. (Ky.) 545; Fisk v. Eldridge, 13 Gray (Mass.) 474; Robertson v. Banks, 9 Miss. 666; Cravens v. Logan, 7 Ark. 103; Fowler v. Atkinson, 6 Minn. 578; Austell v. Rice, 5 Ga. 472; Bryante v. Durkee, 9 Co. 169; Boyd v. Plumb, 7 Wend. (N. Y.) 809; Brigham v. Calvert, 13 Ark. 399; Tassey v. Church, 4 W. S. (Penn.) 346; Hill v. Bannister, 8 Cow. (N. Y.) 31; Chadsey v. McGreevy, 27 Ill. 253.

³ The agent should always sign the name of his principal by himself as *agent*, and never in his own name only. Cooke v. Wilson, 1 C. B. N. S. 153; Greene v. Koppe, 18 C. B. 149; Deslandes v. Gregory, 2 E. & E. 602; Clayton v. Southern, 7 Exchq. 717; Parker v. Winlow, 7 E. & B. 492. Thus, if an agent executes a contract in this manner: “For John Doe, Richard Roe,” without adding the word, *agent*, it will be the personal con-

tract of Richard Roe, and he alone may sue or be sued upon it. Clay v. Southern, ante. And parol evidence would not be admissible to exonerate him from liability thereon, as that would contradict the writing. Higgins v. Senior, 8 M. & W. 844; Wells v. Coons, 20 Wend. (N. Y.) 257; but it would be admissible to charge the principal and to enable him to sue or be sued thereon. Higgins v. Senior, 8 M. & W. 844; Humphrey v. Dale, 7 E. & B. 266. If he attempts to convey lands or any interest therein in his own name, no title or interest therein passes. Pryor v. Coulter, 1 Bailey (S. C.) 517; Campton v. Cassada, 33 Ga. 428; Bellas v. Hays, 5 S. & R. (Penn.) 427; but if the instrument on its face purports to be the contract or covenant of the principal, it will bind the principal, although it is signed by the name of the agent as “agent for—,” the principal. Hall v. Woods, 10 N. H. 470. See also Cook v. Sanford, 3 Dana (Ky.) 237, where it was held that where the terms of an obligation, signed by an agent for his principal, and not with that of the agent, as “*the* promise to pay,” signed, “V. M. for N. B. C. & Co.,” it must be understood as the obligation of the principal, and this is generally the rule, when it ap-

strument executed by an agent, as follows, "John Doe, Agent for Richard Roe," all that follows after his own name, is mere matter of description, and the lease or other instrument is treated as that of the agent, and is not binding upon the principal.¹ Great care in this respect should be observed by agents or attornies,² as, if they execute the instrument professedly for another he, thereby impliedly warrants that he has sufficient and ample authority to execute such contract on his behalf, and an action will lie against him for a breach of such warranty, if he in fact has not such authority,³ and if he has authority in fact but executes the instrument so defectively as not to bind the principal, but as appear to be his own personal contract, he will be personally responsible thereon. So, too, care should be observed that the covenants of the lease appear to be the covenants of the principal, as, if a person describes himself in the beginning of an agreement to grant a lease, as making it on behalf of another, but in the subsequent part of it says that *he* will execute the lease, he is personally liable. Thus, where the solicitor of the assignees of a

appears upon the *face* of the instrument that he acts in the capacity of agent. *Dean v. Roesler*, 11 Hill (N. Y. C. P.) 420; *Magill v. Hinsdale*, 6 Conn. 464, and it must be executed in the *name* of the principal or he will not be bound. *Sencerbox v. McGrade*, 6 Minn. 484; *Copeland v. Ins. Co.*, 6 Pick. (Mass.) 198; *Savage v. Rix*, 8 N. H. 263; *Dennison v. Story*, 1 Oregon, 272; *Spencer v. Field*, 10 Wend., (N. Y.) 87, and if the authority is special, it must be strictly pursued, and any substantial variation therefrom renders it void. *Nixon v. Hyserant*, 5 John. (N. Y.) 58; *Allen v. Ogden*, 1 Wash. (U. S. C. C.) 178; and if two or more agents are appointed, *all* should sign. *Law v. Perkins*, 10 Vt. 532; *Copeland v. Ins. Co.*, ante; *Jewett v. Alton*, 7 N. H. 253; *Johnson v. Bingham*, 9 W. & S. (Penn.) 56; *Rollins v. Phelps*, 5 Minn. 463; but in New York a majority may act. *Woolsey v. Tompkins*, 23 Wend. (N. Y.) 824; so in Iowa R. R. Co. v. Stew-

art, 25 Iowa 115; in Maine, by statute. *Jenkins v. School District*, 39 Me. 220.

¹ *Echols v. Cheney*, 28 Cal. 157; *Locks v. Alexander*, 1 Hawks. (N. C.) 411; *Bogart v. DeBussey*, 6 John. (N. Y.) 64; *Morrison v. Bowman*, 29 Cal. 337; *Saxon v. Blake*, 29 Beav. 438; *Frontier v. Small*, 1 Stra. 705; 2 Ld. Rayd. 1418; *Combe's Case*, 9 Coke, 77 a. *Cook v. Wilson*, 1 C. B. N. S. 153; *White v. Cuyler*, 6 T. R. 177; *Appleton v. Binks*, 5 East, 148; *Parker v. Winlow*, 7 E. & B. 942; *Wilks v. Bach*, 2 East, 142.

² In *Combe's Case*, 9 Coke, 77 a, the court held that, "when one has authority to do an act, he ought to do it in his name who gives the authority, and he cannot do it in his own name, nor as his own proper act."

³ *Bond v. Storrs*, 13 Conn. 412; *Kirkman v. Benham*, 28 Ala. 501; *And v. Magruder*, 10 Cal. 282; *Conro v. Port Henry Iron Co.*, 12 Barb. (N. Y.) 27.

bankrupt tenant, upon whose lands a distress had been put by the landlord, executed an instrument as follows: "We, as solicitors to the assignees undertake to pay to the landlord his rent, provided it do not exceed the value to the effects distrained," they were held personally liable thereon. So where one covenants for himself, his heirs and assigns, and under his own hand and seal, for the act of another, he is personally bound by the covenant, although he describes himself in the instrument as covenanting for, and on behalf of such other person.

SEC. 131. **Agent or attorney cannot delegate his power.**—Where a power is given, whether over real or personal estate, and whether the execution of it will confer the legal, or only equitable rights on the appointee, *if the power reposes a personal trust and confidence* in the agents to exercise his own judgment and discretion, he cannot refer the power to the execution of another, for *delegates, non potest delegare*. Thus, where a father had a power of appointment to his children over real estate, and he delegated the power to his wife, LORD HARDWICKE said that this must be considered as a power of attorney which could be executed only by the husband, to whom it was solely confined, and was not in its nature transmissible or delegatory to a third person.¹ A person whose consent is made requisite to the due execution of power, cannot authorize another as his attorney to consent to an execution of it,² unless the instrument itself authorizes such delegation of power.³ But where a person acts under a parol authority, or even under a written appointment, if he delegates authority to another to do an act embraced within the scope of his agency, and the principal adopts it, it is as obligatory as though done by the agent himself; and the same is true if from

¹ *Ingram v. Ingram*, 2 Atk. 88; *Hamilton v. Royse*, 2 Sch. & Lef. 330. This, however, is not the rule where the appointment itself provides for the appointment of sub-agents, or that the act may be done by any person whom the agent or attorney may appoint, or,

where the nature of the act or acts to be done are such as necessarily to call for the aid of others. *Palliser v. Ord*, Bunb. 166.

² *Hawkins v. Kemp*, 3 East, 410; *Atty. Genl. v. Scott*, 1 Ves. 407; *Sugden on Powers*, 175.

³ *Palliser v. Ord*, Bunb. 166.

the circumstances it was evidently contemplated by the parties that the agent would employ others to act for him.¹

SEC. 132. Real estate agents.—Real estate agents, employed to let houses or other real estate, are, *prima facie* at least, if in possession of the keys of the house, authorized to let the premises upon such terms as they choose to make, and to let the tenant into possession, and it has been held that they are answerable to the landlord if they fail to make reasonable inquiries as to the solvency of the tenant;² but the question as to whether that was a part of his duty in a particular case is for the jury, in view of his employment, the usages of the place, if there are any, and all the circumstances of the case.³ The authority of such agents to let premises and bind the principal, is to be determined in the same manner as the authority of other agents. An agent authorized to let premises cannot let them to himself, as one who

¹ Lyon v. Jerome, 26 Wend. (N. Y.) 485; Smith v. Sublett, 28 Tex. 163; Lynn v. Burgoyne, 13 B. Mon. (Ky.) 400; Stoughton v. Baker, 4 Mass. 522. Where the powers are merely mechanical, Commercial Bank v. Norron, 1 Hill (N. Y.) 501; and do not involve skill, discretion, or trust, and confidence, Grinnell v. Buchanan, 1 Daly (N. Y. C. P.) 538; Joor v. Sullivan, 5 La. An. 177; the agent may delegate them to others, and such is also the rule, when from the nature of the transaction, or the peculiar circumstances of the case, or the usages of the business, it was evidently contemplated by the parties that the agent would employ others to act with or for him. Smith v. Sublett, 28 Tex. 163; Stoughton v. Baker, 4 Mass. 522. Where a person is appointed attorney, with power of substitution, either for the leasing or sale of land, if he appoints a substitute, the latter must execute the lease or deed as substitute, and not as attorney for the principal. Strickcomb v. Marsh, 15 Gratt. (Va.) 202, but the attorney cannot recover the rents or purchase-money

in an action in his own name. Hutchins v. Gilman, 9 N. H. 359.

² Hayes v. Tindall, 3 F. & F. 444.

³ Hayes v. Tindall, 1 B. & S. 296; Hemmenway v. Hemmenway, 5 Pick. (Mass.) 389. There would seem to be no doubt that if a real estate or other agent was directed by his principal to let the premises to a responsible tenant, he would be bound to exercise such diligence in ascertaining the responsibility of a tenant, as a prudent man would employ in his own affairs. Hemmenway v. Hemmenway, ante; Moore v. Gholson, 34 Miss. 372; Anthony v. Smith, 9 Humph. (Tenn.) 508, upon the principle that an agent for hire, even without specific instructions, is bound to observe all the precautions ordinarily pursued in the particular business, and according to the usages of the place and the circumstances. Redfield v. Davis, 7 Conn. 439; Mill v. White, 11 La. An. 170; Wright v. R. R. Co., 16 Ga. 38; Hall v. R. R. Co., 15 Md. 362; Adams v. Capron, 21 Md. 186; Babcock v. Orbison, 25 Md. 75.

undertakes to act for another in a matter cannot in the same matter act for himself.¹

SEC. 133.—**Authority must be strictly pursued.**—An agent for the letting of real estate, whether authorized in writing under seal or by parol, must proceed *substantially* according to the power conferred,² and if he exceeds his instructions, his principal is not bound by his acts, and he becomes personally responsible, and the fact that his intentions were good, and, as he believed, his acts were for the benefit of his principal, will not excuse him.³ But there are instances where his acts have been sustained, when in excess of his authority, at least so far as they were consistent with his authority. Thus, where an agent made a lease for *twenty* years, when he was authorized to make it for only *ten*, was held in equity to be a good lease for ten years,⁴ but at law it is held not to be good *pro tanto*;⁵ but if the tenant enters under it, and the landlord has received the rent, it is evidence of some kind of tenancy, the nature of which is to be determined by a jury.⁶

¹ Whichcote v. Lawrence, 3 Ves. 746.

² Long v. Coburn, 11 Mass. 97; Townsend v. Hubbard, 4 Hill (N. Y.) 357; Walker v. Smith, 1 Wash. (U. S. C. C.) 152; Kerr v. Colton, 23 Tex. 411.

³ Hardeman v. Ford, 12 Ga. 205; Holmes v. Misroom, 3 Brev. (S. C.) 209; Merritt v. Wright, 19 La. An. 91; but he is bound by his instructions only as he understood them, unless there is fraud, or some fault on his part in not comprehending them, and in the absence of all proof he will not be presumed to be in fault in not properly comprehending his instructions to their full extent, particularly if such instructions were given orally, or if in writing, if they were susceptible of such a construction as he put upon them. Pickett v. Pearson, 17 Vt. 470. But if the agent is guilty of any fraud, or if fraud is fairly inferable from the circumstances, the principal will not be bound. Proudfoot v. Wightman, 78 Ill. 553.

⁴ Perry v. Bowen, Nelson, 87; Sugden on Powers, 545; Alexander v. Alexander, 2 Ves. 644; Pitt v. Jackson, 2 Bro. Ch. Cas. 54; Phillpot's Case, 3 Leon, 29.

⁵ Roe v. Prideaux, 10 East, 158.

⁶ In Roe v. Prideaux, ante, an estate was settled on several tenants for life, in succession, with remainders in tail, with power to every tenant for life who should be entitled to the freehold of the premises, or any part thereof, to make leases for any time or number of years not exceeding twenty-one. It was held that a lease made by one of the tenants for nineteen years, determinable on lives as it might exceed twenty-one, was void at law, and was not even good *pro tanto*, but the jury having found that the tenant in tail had received the rent reserved by such lease, after the death of the tenant for life who made it, and who had not given any notice to quit, it was held that the receipt of the rent by him was evidence of a tenancy, the particular nature of

SEC. 134. Agent to take leases.—A person who is authorized to take a lease of premises for another, can bind his principal by any usual covenants, though not specially empowered in that respect. If he takes the lease in his own name, the principal may compel him to assign it to him, if it is shown that the real object and understanding of the parties was, that the lease was to be for the benefit of the principal; or if it is a mere agreement for a lease, made in the agent's name, the principal may, by bill in equity against the lessor and the agent, compel the making of a lease in pursuance of the agreement to him,¹ and it is not material whether at the moment he intended that the agreement should be for his benefit or the principal's, as in either case the principal would, as against him, be entitled to its benefits,² as the agent is to be treated as a trustee for his principal.³

SEC. 135. Misrepresentation by agent.—If, upon the leasing of premises by an agent, he *fraudulently* misrepresents their condition, the principal will be bound thereby, although he gave no instructions to the agent in that respect.⁴ But in order to sustain an action against the prin-

which it was the duty of the jury to decide upon. It is hardly to be doubted that at the present time, acquiescence on the part of a principal in the acts of his agent, or of one who has done an act for him, *knowing* the facts, will constitute a full ratification thereof that will make his acts binding upon the principal, especially where such acquiescence cannot be explained or otherwise accounted for, except upon the ground that the principal ratified and confirmed his acts. *Shaw v. Nudd*, 8 Pick. (Mass.) 9; *Farwell v. Howard*, 26 Iowa 381; *Williams v. Merritt*, 23 Ill. 628; *Bredin v. Dubarry*, 14 S. & R. (Penn.) 27; *Cairnes v. Blecher*, 12 John. (N. Y.) 300; *Kehlor v. Kemble*, 26 La. An. 713; *Burgess v. Harris*, 47 Vt. 322; *Union, &c., Mining Co. v. Rocky Mountain National Bank*, 2 Cal. T. 565; *Whitehead v. Wells*, 99 Ark. 99; *Searing v. Butter*, 69 Ill. 575; *Abbott v. May*, 60 Ala. 97; *Turner v. Wilcox*, 54 Ga. 593.

¹ *Taylor v. Salmon*, 4 My. & Cr. 184.

² *Wilson v. Hart*, 1 J. B. Moore 45; *Lees v. Nuttall*, 1 R. & My. 53; *Maclean v. Dunn*, 4 Bing. 722.

³ *Lees v. Nuttall*, ante.

⁴ *In Law v. Grant*, 37 Wis. 548, an agent employed to sell lands made certain false representations in reference thereto, without the authority or knowledge of his principal. The court held that the principal was chargeable with the fraud in the same manner as though he had known of, and authorized them. See also *Fuller v. Wilson*, 3 Q. B. 58. It is proper to say, however, that the doctrine of this case was subsequently overruled upon a hearing of the case in the Exchequer Chamber, 3 Q. B. 68, and the court held that, unless actual fraud was shown, either on the part of the principal, or of the agent, no recovery could be had. See also 3 Q. B. 1009, where the opinion of *TINDAL, J.*, is given.

principal, either for fraud¹ or for deceit;² fraud, either upon the part of the principal, or of the agent, must be shown. If the principal, knowing that the premises were objectionable on account of a nuisance existing thereon, should purposely employ an agent to lease the same, who knew nothing of the existence of the nuisance, and the agent in ignorance thereof should represent the house as not objectionable,³ the principal would be deemed guilty of

¹ Fuller v. Wilson, 3 Q. B. 68, 1009; Feret v. Hill, 15 C. B. 207; Cornfoot v. Fowke, 6 M. & W. 358.

² Ormond v. Huth, 14 M. & W. 651; Fuller v. Wilson, ante.

³ See opinion of ALDERSON, B., in Cornfoot v. Fowke, 6 M. & W. 371, where he says: "It is said that this will open a door to fraud, by enabling parties in the situation of this principal to appoint agents who unconsciously may make misrepresentations to the injury of third persons. This does not follow. *If the fact could be shown, it would be a fraud on the part of the principal, with such a motive, to appoint such an agent.*" In this case the principal employed an agent to let a house for him, and the agent upon being inquired of by him if the house was objectionable, replied that it was not, and the defendant thereupon entered into an agreement to take a lease of it. It turned out that the house was objectionable, because the house next door was a brothel, but the agent was ignorant of this fact, nor did the landlord instruct him to make any representations in reference to the matter, or fraudulently concealed the fact from him. The defendant, upon ascertaining the fact, refused to take the lease, and in an action against him for breach of the agreement, the court held that the plaintiff was entitled to recover because no fraud upon the part either of the principal or agent, was established, and that in order to sustain an action for fraudulent representation, or in order to defend against an action upon that ground, the representation should have been communicated for a fraudulent purpose. See also to

same effect, Ormond v. Huth, 14 M. & W. 551; Moens v. Heyworth, 10 id. 147; Taylor v. Ashton, 11 id. 401; Wilson v. Fuller, 3 Q. B. 68, 1009; Evans v. Collins, 5 Q. B. 820. But in the case of Cornfoot v. Fowke, ante, LORD ABINGER, C. B., dissented from the doctrine advanced by the court, and in an able opinion, the arguments adduced in which are much more consistent with principle, and much more convincing, insisted that liability should exist on the part of the principal for the misrepresentations of the agent in reference to the business with which he was entrusted, whether he was guilty of intentional fraud or not, insisting that it was a fraud upon the part of the agent to give an assurance upon a matter in reference to which he knew nothing, as well as to give an answer which he knew to be false. And this is believed to be the American doctrine. If an agent assumes to give information as to material matters, about the truth or falsity of which he knows nothing, it is difficult to conceive why, if the information is in fact false, it is not as much a fraud upon the party with whom he is dealing, as a statement made by him which he knows to be false (Bennett v. Judson, 21 N. Y. 288); and it will be noticed that the court, in Fuller v. Wilson, 3 Q. B. 68, do not attempt to justify the doctrine of Cornfoot v. Fowke, ante, but based their decision upon the ground that the defendant did not rely upon any representations of the agent, but grounded himself upon a supposed knowledge of the usual course of practice in such cases; and upon the ground the doctrine of the case is clearly

a fraud, and liable therefor,' although he did not instruct him to make such representations.' If the principal authorizes any false representations to be made by the agent, or if he connives in any way to their being made, as, by purposely concealing the facts from him, or knowingly employs an agent who is ignorant of the real condition of the lease, or of well grounded objections thereto, in order that he may inaccurately or ignorantly answer questions in reference thereto, the person deceived thereby has his remedy against the principal for the fraud, and in some cases, where he can put the other party *in statu quo*, may rescind the contract upon that ground.* But if the estate has passed to him, or if he has taken possession, he cannot put the other party *in statu quo*, and cannot rescind.'

maintainable. Because, if the person does not *rely* upon a statement made by an agent, but makes inquiries for himself and acts upon his own supposed knowledge, he cannot claim that he has been misled by the agent. In our courts it is held that the acts, representations and declarations of an agent, made within the scope of his real or *apparent* authority, are to be treated as having been made by the principal himself. *Chorpenning v. Royce*, 58 Penn. St. 476; *American Fur Co. v. United States*, 2 Pet. (U. S.) 358; *Sharp v. New York*, 40 Barb. (N. Y.) 256; *City Bank v. Bateman*, 7 H. & J. (Md.) 104; *Locke v. Stearns*, 1 Met. (Mass.) 560. And this is so even though the agent made such representations without the knowledge of his principal. *Wright v. Calhoun*, 19 Tex. 412; *Henderson v. R. R. Co.*, 17 Tex. 560; *Jeffreys v. Bigelow*, 18 Wend. (N. Y.) 518;

or even though he acted contrary to the instructions of the principal in making such representations. *Lobdell v. Baker*, 1 Met. (Mass.) 193. But representations made by an agent without authority, and contradicted by the express terms of the contract, are not binding upon the principal, *Cook v. Whitfield*, 41 Miss. 341. Whatever may be the English doctrine, there can be no doubt that in this country the defence set up in *Cornfoot v. Fowke*, ante, would be available, even though the agent did not at the time *know* that his representations were false. *Bennett v. Judson*, 21 N. Y. 238.

¹ See last note.

² In *Fuller v. Wilson*, Q. B. 58, 68, 1009.

³ *Hunt v. Silk*, 6 East, 449; *Blackburn v. Smith*, 3 Exchq. 783; *Clark v. Dickson*, E. B. & E. 148.

⁴ *Blackburn v. Smith*, ante.

CHAPTER XX.

OF LEASES BETWEEN PARTICULAR INDIVIDUALS.

SEC. 136. By principal to agent—By client to attorney—By ward to guardian—By cestui que trust to trustee—By mortgagor to mortgagee.

SEC. 137. Leases to, may be good.

SEC. 138. Consideration may be mixed.

SEC. 139. What should be done to avert suspicion of unfair dealing.

SEC. 140. Effect of acquiescence.

SEC. 141. Leases from client to attorney.

SEC. 142. Rule in *Dawson v. Massey*.

SEC. 143. Leases between relatives and members of the family.

SEC. 144. Rule in *Mulhallen v. Marum*.

SEC. 145. Mortgagor to Mortgagee.

SEC. 136. By principal to agent—By client to attorney—By ward to guardian—By cestui que trust to trustee—By mortgagor to mortgagee.—“Leases,” says Mr. Platt in his work on Leases,¹ “granted to agents by their principals or employers; to attorneys by their clients; to guardians by their wards, soon after attaining their majority; to trustees by their *cestuis que* trust, and others in similar fiduciary situations, though unimpeachable at law, are viewed with the utmost jealousy in equity, lest an undue advantage should be taken by the lessees of the influence or knowledge acquired by them in their confidential character; and the slightest appearance of unfair dealing will suffice to invalidate the entire transaction.

SEC. 137. Leases to, may be good.—But there is no rule of policy even in equity, which absolutely prohibits an agent, or attorney, from being the lessee of his employer, principal, or client.² And a lease purely voluntary may

¹ Platt v. Leases, 559, 566.

² 84; Lord Selsey v. Rhoades, 2 Sim.

³ Harris v. Tremeneheere, 15 Ves. & Stu. 41, 49; on appeal, 1 Bli. P.

be granted from motives of kindness and friendship, even during the continuance of the relation ; nor can it be annulled unless misrepresentation, circumvention, or undue means, be resorted to for the purpose of influencing the lessor. The slightest hint, however, in answer to a bill or in the evidence, that the lessee had laid before the lessor an account of the value of the premises, which was not perfectly accurate, will be a sufficient inducement for the court to set aside such lease, whatever the parties might intend, upon the general ground, that the principal never would be safe if the agent could take a gift from him upon a representation that was not most accurate and precise.¹

If the lease be granted to the agent, not gratuitously, but upon consideration, if any doubt be raised, it is incumbent on the lessee to shew that he made as good a bargain for his employer, as against himself, as a provident, well managing, honorable agent, acting most adversely, in a fair sense, would ; and that he paid the full amount that he could have obtained from any other person.² Thus in one case the lease was set aside, the lessee, who was the agent and attorney of the lessor, having obtained it for a consideration grossly inadequate ; the circumstances of the lessor being at the time in an extremely embarrassed state.³ And, in like manner, where a reversionary lease was granted to commence upon the determination of a life of seventy, contrary to a former resolution by the lessor not to grant another reversionary lease where only one life above the age of sixty was existing, and the consideration professed to have been given for the lease was 150*l*. LORD ELDON thought that the defendant should have produced evidence, in support of the transaction, that the consideration was adequate ;

C. N. S. 1 ; Ward v. Hartpole, 3 Bli. P. C. 470 ; Hunter v. Atkins, 3 Myl. & Keen, 113, 135 ; Jones v. Thomas, 2 Yo. & Col. Exchq. 498, 519 ; Ker v. Lord Dungannon, 1 Dru. & War. 509, 542 ; Malony v. Kernan, 2 Dru. & War. 31, 88 ; Andrews v. Mowbray, 1 Wills. Exchq. 71, 73. And see Dent v. Bennett, 4 Myl. & Cr.

269, as to an agreement between a patient and his medical attendant.

¹ Harris v. Tremeneheere, ante.

² Ker v. Lord Dungannon, 1 Dru. & War. 509 ; Molony v. Kearnan, 2, Dru. & War. 31.

³ Harris v. Tremeneheere, 15 Ves. 42.

for the fairness of the bargain was not to be presumed ; and as he had failed to do so, an issue was directed ; and the verdict upon the trial being against the adequacy of the consideration, a decree was made directing the lease to be delivered up.¹

The same equity affects an assignee of the lease with notice.²

SEC. 138. **Consideration may be mixed.**—Notwithstanding LORD ELDON'S remark that when the grant is founded on a proposal for purchase, the court will not permit motives of kindness and gratuity to be mixed with it,³ it is said, in a more recent case, that the transaction may be founded partly on a pecuniary consideration, and partly on motives of bounty ; but that, where the consideration is thus mixed, the steward is bound to make out that his employer was fully apprised of every circumstance respecting the property which either was or ought to have been within the knowledge of the steward, and which could tend to demonstrate the value of the property, and the precise measure and extent of the bounty of the employer.⁴

SEC. 139. **What should be done to avert suspicion of unfair dealing.**—In all cases of this kind, to avoid the suspicion of unfair dealing, the party contracting for the lease should avail himself of the mediation of a third person ; the neglect of this precaution being sufficient to justify an examination.⁵ “The court,” said LORD ELDON,

¹ Harris v. Tremenheere, 15 Ves. 39, 40, per LORD ELDON. Hunter v. Atkins, 3 Myl. & Keen, 138; Ker v. Dungannon, 1 Dru. & War. 509, 542.

² Harris v. Tremenheere, 15 Ves. 43; Lord Selsey v. Rhoades, 2 Sim. & Stu. 50; Beaumont v. Boulsbee, 5 Ves. 485; S. C. 7 Ves. 599; 11 Ves. 358; Lady Ormond v. Hutchinson, 13 Ves. 47; 16 Ves. 94; Medlicott v. O'Donnel, 1 Ball & Beat. 164; Hunter v. Atkins, 3 Myl. & Keen, 435; 140; Champion v. Rigby, 1 Russ. & Myl. 539; S. C. 1 Taml. 421. And see Rossiter v. Walsh, 2 Con. & Law. 563; S. C. 4 Dru. & War. 458; noticed ante p. 391.

³ Ward v. Hartpole, 3 Bli. P. C. 470; and Gartside v. Isherwood, 1 Bro. C. C. 558; Appendix, 5th ed. by Belt.

⁴ Lord Selsey v. Rhoades, 2 Sim. & Stu. 50, per Leach, V. C.; S. C. 1 Bli. P. C. N. S. 1. And see Dawson v. Massey, 1 Ball & Beat. 235; Lord Kingsland v. Barnewall, 1 Bro. P. C. 164; Toml. ed. vol. 4, p. 154; Jour. vol. 18, p. 264; Rhoades v. Beauvoir, 6 Bli. P. C. N. S. 195.

⁵ Harris v. Tremenheere, 15 Ves. 40-1; Hunter v. Atkins, 3 Myl. & Keen, 137, *et seq*; Watt v. Grove, Grove v. Watt, 2 Scho. & Lef. 592, 592.

"never ought to give costs upon the result of that examination, where the party has not interposed any other person";¹ and in one case he refused the costs of the appeal, declaring at the same time that he should not have given costs in the court below, as had been done in the Vice-Chancellor.² The costs which were allowed on the dismissal of the bill in *Harris v. Tremenheere*, as to some of the voluntary leases granted to the defendant, were given on the ground of such leases being an inducement to, and provision upon, the defendant's marriage.

But, on setting aside leases so granted, the lessee will be allowed credit for valuable and lasting improvements of the property.³

SEC. 140. *Effect of acquiescence.*—Length of acquiescence, however, or acts of confirmation may give validity to leases which could not originally have been supported, had means been resorted to within a reasonable time for the purpose of setting them aside. Thus, in a case where the plaintiff had slept upon his title for twenty-seven years, during which period the defendant was altogether divested of the fiduciary character of agent, and every other character which could have infected the transaction had ceased to subsist, the court refused to interpose to vacate the leases.⁴ The same rule prevailed in the case of *Lord Selsey v. Rhoades*. James Lord Selsey, being tenant for life with power of leasing, in the year 1804, concurred with Mr. Peachy, his son, the next tenant for life, in an agreement with the defendant, their steward, to grant him a lease for twenty-one years, under circumstances which it is not necessary to particularize. On Lord Selsey's death in 1808, Mr. Peachy (then John Lord Selsey) became tenant for life, and executed a lease in 1809 according to the terms of the agreement. He died in 1816, when the reversion became vested in

¹ *Ibid.* And see *Medlicott v. O'Donnel*, 1 Ball & Beat. 156.

² *Selsey v. Rhoades*, 1 Bli. P. C. N. S. 8.

³ *Watt v. Grove*, *Grove v. Watt*, 2 Scho. & Lef. 492, 513; *Attorney-General v. Baliol College, Oxford*,

9 Mod. 411; *Ward v. Hartpole*, 3 Bli. P. C. 470, 490.

⁴ *Medlicott v. O'Donnel*, 1 Ball & Beat, 156, 164. And see *Blackney v. Bagot*, 3 Bli. P. C. N. S. 237; *Champion v. Rigby*, 1 Russ. & Myl. 539; S. C. Taml. 421.

the appellant, who delayed the filing of his bill till 1821, having in the meantime accepted the rent reserved in the lease. "I have looked," said Lord ELDON,¹ "into this case, with a desire to affect the lease; for the situation of the parties was such as to induce a court of equity to look at the transaction with great suspicion. If the suit had been instituted recently after the contract, and there had been no acts of confirmation, probably the lease might not have stood; but James Lord Selsey and John Lord Selsey acquiesced so long, being well acquainted with the facts, that it is difficult to say that they could have impeached the lease, and the appellant cannot do that which they could not have done." There is no limited time, however, within which relief must be sought; every case must depend on the peculiar circumstances which give rise to the application.

SEC. 141. *Leases from client to attorney.*—Leases granted by a client to his attorney are governed by the same principles as those between employer and steward.²

As to leases taken by a guardian of his ward, it was said by L. C. MANNERS,³ "Generally speaking, there are no transactions in a man's life that ought in this court to be more scrupulously or with more jealousy examined, than those which occur recently after a ward attains the age of twenty-one, affecting his real property. Antecedent to that period his infancy is his protection, his disabilities are his security; but instantly after he attains the age of twenty-one, as if he had acquired all the prudence and experience necessary to the management or disposal of his property, with the possession are given the absolute control and dominion over his estates. At law, all his acts are binding, all his deeds are valid, unless, upon some distinct case of fraud, they

¹ Selsey v. Rhoades, 1 Bli. P. C. N. S. 8.

² Harris v. Tremenheere, sup. Lord Selsey v. Rhoades, sup.; Ward v. Hartpole, sup.; Watt v. Grove, Grove v. Watt, 2 Scho. & Lef. 492, 503. And see Kenney v. Browne, 3 Ridg. P. C. 462; Blakeney v. Bag-

ott, 3 Bli. P. C. N. S. 287; Jones v. Thomas, 2 Yo. & Col. Exchq. 498; Champion v. Rigby, 1 Russ. & Myl. 539; S. C. Tam. 421; Rhodes v. Beauvoir, 6 Bli. P. C. N. S. 195.

³ Dawson v. Massey, 1 Ball & Beat. 232.

cannot be impeached ; but it is not so in this court ; those relations of guardian and ward, principal and agent, trustee and *cestui que* trust, which are little regarded in a court of law, are in this court decisive against the validity of a transaction which between strangers could not be impeached."

This last position carries the doctrine higher than, perhaps, is recommended by sound policy ; and as to principal and agent, and trustee and *cestui que* trust, at least, is certainly inconsistent with the cases previously cited in this chapter. Without doubt, however, transactions between guardian and ward, occurring soon after the determination of the relation, require the most satisfactory proof of fair dealing to support them.

SEC. 142. **Rule in Dawson v. Massey.**—In a leading English case,¹ Mr. Massey, the defendant, and the plaintiff's uncle, had been agent to the plaintiff's father for thirty years, and in that capacity had acquired an intimate knowledge of the nature and value of the estate. He then became guardian to the plaintiff, who was a young man educated in England, and had not seen his estate since he was a boy. In Sept. 1800, the plaintiff came of age, and then apprised his uncle of his intention to appoint an agent ; the uncle, displeased at his so doing, urged him strongly against it, and made use of the expression, "that no one could acquire a knowledge of the estate for years." The plaintiff, however, did appoint one John Massey, (not the defendant) his agent, and went over to Ireland assisted by him, and immediately after entered into a treaty with his uncle, who then obtained five leases of different parts of his nephew's estate ; some for ever, and the remainder for four lives, the latter containing clauses of surrender ; and the uncle soon afterwards underlet those lands at a profit rent of nearly 1300*l.* per annum. It appeared from the depositions of John Massey, the plaintiff's agent, that the lands were let at an undervalue ; that the defendant refused to treat

¹ Dawson v. Massey, 1 Ball & Beat. 219.

with him, and actually turned him out of the room when he was treating with the plaintiff for a lease, for having offered his opinion as to the value. It also appeared that the uncle, an elderly man without children, had a considerable influence over his nephew, then very inexperienced in the value of his estates; and that he held out inducements both to Massey, the agent, and to the plaintiff, by letter, stating that whatever interest he got in the leases would ultimately be for the benefit of the plaintiff. It was also proved that persons who would have bid for some parts of the lands taken by the defendant, declined doing so, finding that he had proposed for them. It appeared that, before the defendant got leases of the principal part of the estate, the plaintiff and his agent visited them, and received several proposals for leases which were not accepted. Upon these grounds, as well as upon the ground of the subsisting influence of the uncle over the nephew, though the relation of guardian and ward had ceased, and of the absence of all security for the inducement held out that the transaction would ultimately tend to the advantage of the plaintiff, the court decreed the leases to be set aside, and gave the plaintiff his costs.

SEC. 143. *Leases between relatives and members of the family.*—As to the dealing being one of a family nature, an arrangement between the uncle and nephew, so that the full value of the property or the highest rent was not to be taken as the only consideration between the parties, or the criterion by which the court was to form a judgment of its fairness, his lordship said, that that was not the ground upon which the defence was rested, nor was there any proof of it;¹ and, indeed, he should expect some very satisfactory evidence before he could act upon such a case; something to show that the young man was well advised, and that there was some security for what was held out; but the declaration by the defendant to the

¹ See *Watt v. Grove*, *Grove v. Watt*, 2 Scho. & Lef. 492, 501, per LORD REDESDALE, C.

plaintiff's agent was calculated only to silence the agent, and to keep in check his activity and exertion.'

SEC. 144. Rule in *Mulhallen v. Marum*.—The same doctrine was adhered to in a case¹ where a lease perpetually renewable made by a party shortly after the attainment of his majority to a person standing in the relation of his guardian, agent, receiver, and tenant, was set aside on grounds of public policy, notwithstanding the plaintiff had delayed the filing of his bill for eleven years after the grant of the lease.

And in another case a lease obtained by the guardian's son from the ward a few years after he came of age was set aside thirty years after its execution, the ward being of weak understanding, and continuing during his life under the control and influence of the guardian and his family. The length of time was not considered, under the circumstances, to amount to a bar.²

SEC. 145. Mortgagor to Mortgagee.—A lease is not void, even in equity, simply from the circumstance of its being granted by a mortgagor to his mortgagee; but if there be anything more, the court will look into the transaction with the greatest possible jealousy.³ In the case cited, the lease was set aside, the mortgagee having obtained it at an unfair value, in consequence of the distressed circumstances of the lessor.

¹ 1 Ball v. Beat, 235.

² *Mulhallen v. Marum*, 3 Dru. & War. 317.

³ *Alyward v. Kearney*, 2 Ball & Beat. 463.

⁴ *Gubbins v. Creed*, 2 Scho. & Lef. 214.

The whole of this chapter is from Platt on Leases, being chap. 3 of that work, and is given entire, as

it expresses clearly the course pursued by courts of equity relative to dealings between parties in a confidential relation, where the parties are liable to be unduly influenced by motives of kindness or personal friendship, or to be over-reached by persons in whom they have been taught to confide.

CHAPTER XXI.

LEASES UNDER POWERS.

- SEC. 146. Generally.
- SEC. 147. Construction of power.
- SEC. 148. Execution of the power.
- SEC. 149. What kind of leases may be granted.
- SEC. 150. In whom powers may vest.
- SEC. 151. Usual covenants—proviso for re-entry—counterpart.
- SEC. 152. Leases in possession or reversion.
- SEC. 153. On what land they attach.
- SEC. 154. What is a lease in reversion.
- SEC. 155. Effect of existing leases.
- SEC. 156. Leases in possession or reversion.
- SEC. 157. What are usual covenants within such powers.
- SEC. 158. Ways, &c.
- SEC. 159. Power to grant leases with a proviso for re-entry.
- SEC. 160. What lands are considered as having been lands usually let.
- SEC. 161. Whether lands not before in lease may be demised.
- SEC. 162. Whether such leases are good for part only.
- SEC. 163. Execution of powers delegated to infants, lunatics, feme covert, &c.
- SEC. 164. Statutory powers.

SECTION 146. Generally.—A power is an authority given to a person to dispose of an interest which is given to another.¹ Settlements and wills often empower trustees, or other persons named therein to grant leases; indeed LORD MANSFIELD once said, “of all kinds of powers, this is the most frequent.”² The distinction between powers conferred by deed, will or other grant, and a mere

¹ Goodhill v. Brigham, 1 B. & P. ² Atkyns v. Horde, 1 Burr. 120.

naked power dependent upon the parties' legal rights, is, that in the former case, a lease for any term not in excess of that designated in the instrument conferring the power, or that prescribed by statute, will be valid and binding upon those entitled to the reversion, while in the latter case the lease fails with the failure of the lessor's estate. Thus, if an estate is granted to A. for life, he may grant a lease thereof which will be good during his life; but, if he grants a lease for ten years, and dies the next day, the lease fails, because his estate has failed.¹ But, if the estate had been granted to him during the term of his natural life, with the power to grant leases thereof not exceeding twenty years, the lease would be fed by the power, and would be valid during the whole term, and it is for this reason that such powers are encouraged. "Unless," said LORD MANSFIELD, "the owner of the estate for life is enabled to make a permanent lease, he could not enjoy to the best advantage during his own time; and they who come after, must suffer by the land being untenanted, out of repair, and in bad condition. The plan of this power is for the mutual advantage of possessor and successor."²

SEC. 147. Construction of power.—Powers must be construed according to the evident intent of the parties and so as to support the power if possible,³ and give

¹ The power of granting a permanent lease, extending beyond the estate then possessed by the lessor, never exists by implication. It must be expressly conferred, or it does not exist, and the lease may be avoided by the reversioner. *Bolton v. Grantham*, 3 Burr. 1259; *Markham v. Howell*, 33 Ga. 508; *Sugden on Powers*, chap. 17. A lease granted by a tenant for life or other person, in excess of their own term, will be good between the parties for such a term as the grantor could lawfully grant. *Yellowly v. Gower*, 11 Exch. 274.

² *Atkins v. Horde*, 1 Burr. 120; *Campbell v. Leach*, 2 Amb. 748; *Shannon v. Broadstreet*, 1 Sch. & Lef. 61.

³ *Sugden on Powers*, 713, 734; 1

Platt on Leases, 397-8; *Goodtitle v. Duncan*, 2 Doug. 573; *Doe v. Rendle*, 3 M. & S. 99; *Hawkins v. Kemp*, 3 East 441. A testator devised all his real estate to trustees to pay one-half the rents, issues and profits to such persons and purposes as his niece E., by sealed writing under her hand, should appoint from time to time, notwithstanding any coverture; and in default from time to time of any appointment, to her, her receipt to be a sufficient discharge, and after her death to the use of her child or children; and if they should all die before reaching twenty-one, or if females, twenty-one or marriage, then to his surviving niece or issue. And he devised the other half in like manner to his other niece C.; and

effect to its execution, if not improperly or improvidently exercised.' The creation, execution and construction of powers depends on the words used and the substantia intention and purpose of the parties who gave the power,¹ and such intention is to be collected from the words used,

the share of the one first dying without issue to go to the survivor under the same conditions. Both married, and by a deed of three parts, the trustees by the direction and appointment of the nieces, conveyed all their estate, interest, right and title to the defendant during the natural lives of the nieces. The deed was acknowledged as if *sui juris*, and without separate examination of the married women. E. died without issue, leaving C, who filed a bill against the defendant for E.'s share. It was held that the design was to limit the power of disposal to the rents and profits, and that the nieces had no power to unite with the trustees to convey the fee; that they had power to appoint the rents and profits arising out of the contingent remainders to each depending on the previous death of the other; that the words "from time to time" are not sufficient to limit the appointment and prevent anticipation. *Cooke v. Husbards*, 11 Md. 492. Land was devised to trustees to pay the rents and profits to the use of the wife and children of S. during his life, and a power of appointment by will was given to S. In 1840 the trustees, with S., his wife and one child, conveyed a portion of the estate to the other child. Under this deed, defendant deduced title, and was in possession. S. covenanted not to exercise his power of appointment, and agreed that all his title was extinguished. In 1852 however, S. died, and by his power of appointment, devised the premises in suit, as well as the remainder of the estate, to his wife, through whom plaintiff claimed and brought this action of ejectment. It was held, 1. That as S. had no beneficial or equitable title in the land, his power of appointment was simply collateral, and could not be barred by any act of his. 2. That the covenant of S. was personal only. 3. That, by

the deed of 1840, an estate during the life of S. only was conveyed, the remainder passing, either by his appointment or in the absence of it, over, in accordance with the provisions, in that alternative, of the original will. 4. That the widow of S. was not estopped by the deed of 1840 from taking under S.'s appointment; as a *feme covert*, she could pass only her present beneficial interest for the life of S. 5. That the defendant's possession had not been adverse, as after death of S. he became tenant by sufferance. *Learned v. Tallmage*, 56 Barb. (N. Y.) 443.

¹ *Carver v. Richards*, 29 L. J. Ch. 357. The rules for the construction of powers are variously given. In some cases it has been held that they should be construed strictly for the tenant for life, and liberally for the remainder-man. *Atkyns v. Horde*, 1 Burr. 60, 125; *Orly v. Mahun*, Gilb. Exq. Rep. 58, strictly; *Fitzwilliam's Case*, 6 Coke 32, favorably for the donor, *Berry v. White*; *O'Bridgman by Bann*, 90, 93, liberally; *Bassett v. Thomas*, 8 Burr. 1441, equitably in favor of the donee; *Wood v. Hartpole*, 3 Bligh. 470, indifferently, without leaning to either side; *Earl of Jersey v. Smith*, 7 Price, 813; *Clarges v. Funucan*, 2 Daug. 573, but after all this diversity, but one rule can be sustained, and that is, that the construction must accord with the evident intention of the parties thereto, as previously stated. In *Hawkins v. Kemp*, 3 East 441, *LORD ELLENBOROUGH* says, "The court is to decide according to what they shall judge to be the intention of the parties, not restraining or lessening the power by a narrow and rigid construction, nor by a loose and extended construction, dispensing with the substance of what was meant to be performed."

² *Hall v. Bulkley*, 1 Doug. 293; *Pomeroy v. Partington*, 3 T. R. 605; *Atkyns v. Horde* 1 Burr. 60.

according to their ordinary and common acceptance, and not according to any legal or technical meaning that they may convey,¹ nor is parol evidence admissible to show that the words have acquired a different meaning.²

SEC. 148. Execution of the power.—The lessor must strictly pursue the power, in form and substance,³ and all acts done under it, or any special authority, not agreeable thereto, nor warranted thereby, are void,⁴ and if certain conditions are imposed, the lease must be in strict conformity thereto, and if it varies therefrom either in the interest demised, the mode contemplated, or the rent reserved, it is not valid as against the reversioner or remainder-man,⁵ and the fact that it is more beneficial

¹ Griffith v. Harrison, 4 T. R. 749. Opinion of ASHURST & BULLER, J. J.

² Woodfall's L. & T. 58.

³ LORD MANSFIELD in Atkyns v. Horde, 3 Burr. 120. If the power is coupled with an interest a substantial compliance is sufficient. Rowe v. Becket, 30 Ind. 154; Rowe v. Lewis, 30 id. 163.

⁴ Atkyns v. Horde, 3 Burr. 120.

⁵ Cavan v. Pultney, 5 T. R. 567. A power, given by will, of appointment among the children of a descendant, does not authorize either a general or partial appointment to his grandchildren. Horwitz v. Norris, 49 Penn. St. 213; Little v. Bennett, 5 Jones (N. C.) Eq. 126, nor to children born after the testator's death. Loring v. Blake, 98 Mass. 253. Land purchased with the separate property of a married woman, whose husband was insolvent, was conveyed to a trustee, by deed, providing that it should be held in trust for the sole use of the wife during her life, and after her death for the use of such person as the husband, "by deed made before, or after the death of the wife, but to take effect the refrom," should appoint, and also providing that in case the wife should survive the husband, the land should be held in trust for her, and her heirs, &c., forever. It was held that the power of appointment could be exercised by the husband only in the event of his

surviving his wife. McClintock v. Cowen, 49 Penn. St. 256. A testator bequeathed to his wife all his lands, during widowhood, with the power to sell the same, except a certain number of acres which he willed not to be sold during her widowhood, or the minority of his youngest child, and to devise his estate both real and personal by her will to his children, or their proper heirs, as she might deem right and equal in her best judgment, which should be final. It was held, that the wife had no power under her husband's will to direct by her last will that same number of acres should be rented out by her executors until the youngest child should reach full age, and then sold by them and the proceeds secured, and paid over by them to his children. Doe d. Davis v. Vincent, 1 Houst. (Del.) 416. When the donee of a power is invested with a discretion the courts will not interfere with its exercise. Thus a testator directed that his widow, the stepmother of his children, and such of his children as may see fit, should have the possession and use of his real estate until his youngest child should arrive at seventeen years of age, when he directed it to be sold and the proceeds divided equally between his widow and children; and he authorized his executor, if he should find it more beneficial, to make the sale sooner, and divide

does not help the matter. Thus, where the power requires that a certain fixed rent and a money heriot, payable under peculiar circumstances, shall be reserved, a lease granted under the power reserving a longer heriot, is void ;¹ nor where power is given to demise lands or any part of them, is the power well executed by a demise of part, with liberty of shooting over the whole.* So under a power to

the proceeds. The children left their home, and, the youngest being eight years of age, filed their bill to compel a sale of the real estate, on the ground that the widow had an illegitimate child born before her marriage, and that she was low in social position and of vulgar reputation. It was held that the court could not, under the circumstances, and against the wish of the widow, interfere with the discretion of the executor, he not thinking proper to make the sale. *Greer v. McBeth*, 12 Rich. (S. C.) Eq. 254. Where a will gave a life estate to the wife for life, and then provided, "I further will and request that at her death she make such a disposition of it as she thinks best," it was held that such power could be executed only by an appointment by will and could not be executed by deed or other conveyance. *Potter v. Thomas*, 23 Ga. 467; *Moore v. Diamond*, 5 R. I. 121. So where a testator demised slaves to his wife during her natural life, and at her death to be sold and equally divided among his lawful heirs; it was held that such power could not be executed by the executors during her life. *Duke v. Palmer*, 10 Rich. (S. C.) Eq. 380. Where a power is conditional, and dependent upon a contingency, it cannot be executed until such contingency happens, as where a testator directed his debts to be paid out of the moneys due him, "but in case my creditors will not wait a reasonable time to allow my executors to collect my debts or to raise the sum I owe from the income of my estate, then, and in such case, I empower my executors to sell and dispose of such part of my estate as they shall think most to the advantage of my estate," it was held that this power could not

be executed until the necessity thereafter arose. *S. Carolina R. Co. v. Toomer*, 9 Rich. (S. C.) Eq. 270. See also *Cleveland v. Boerum*, 27 Barb. (N. Y.) 252; and *Hull v. Culver*, 84 Conn. 408; to the same effect. In *Sherman v. Hicks*, 14 Gratt. (Va.) 96; T. conveyed land to S., and C. his wife, to have and to hold to S. during his natural life, with reversion fee to C. and her heirs. S. covenanted with T. and C. that she should have the privilege, whether she should choose to execute it during coverture or not, to nominate by last will and testament, or power of appointment, in presence of two witnesses, such person as she might designate for her heir or heirs to such land after the death of B. It was held, 1. That a valid power of appointment, in during the lifetime of her husband, was conferred on C., notwithstanding her estate in fee. 2. That this power was well executed by an holograph will, the provision as to witnesses applying to other methods of appointment.

¹ *Egremont v. Helling*, 6 Jur. (Q. B.) 821.

² *Dayrell v. Hoare*, 12 Ad. & El. 356. The reason for this rule is that the right of shooting cannot be granted of itself under a power that simply confers the right to lease "the estate, hereditaments or premises, or any part thereof," because it is a mere privilege to the grantee, and not comprehended under the power conferred. There being nothing to which it is appendant or appurtenant, it cannot be considered as an easement. It is a right which can arise only out of the possession of the land, and is an incident to the land and such a power does not warrant the separation of the incident from the land. *PATTISON, J.*, in *Dayrell v. Hoare*, 12 id. 370. In *Waldron*

demise lands reserving the *ancient* rent, a demise of those

v. Chastney, 2 Blatch. (U. S. C. C.) 62; E., in 1819, devised real estate to R., his wife, for life or during her widowhood, to support herself, her three daughters, and one P., and on the death or marriage of R. the same to go to P., for life, to support himself and the daughters; and after the death or marriage of R. and the death of P. to go to the daughters in fee. Power was given to R. so long as she remained single, and afterwards to P. to sell and convey the real estate, provided that B. shall in writing, signed with his hand, approve and consent to such sale; but no such sale shall be valid without such approbation and consent; and the moneys arising from the sale were directed to be invested as B. should direct. It was held that under the will, R. had only a naked power in respect to the disposition of the estate, and that the power could be rightly exercised only by a sale of the estate in fee; and that a lease, as a conveyance under the power of sale in the will, was void, as not fulfilling the intent of the testator, and not being a sale of the estate for cash, or something which could be invested as its representative. But R. having an absolute estate for her widowhood, it was held, that she could lease that, independently of the power of sale, and that the lease given was good for the interest she had, and void only for any surplus of the term unexpired at her decease. The testator having died, and the will being duly proved, R., in 1825 as executrix and trustee, leased the estate for twenty-one years to N., setting forth the will at large in the lease, the lessee to pay a certain rent to R., her heirs and assigns, yearly during the term, if she should so long live and remain the widow of E., and after her death or marriage, during the residue of the term then unexpired to P. In 1827, R. sold and conveyed the same real estate in fee to H., the conveyance purporting to be made by her executrix and trustee under the will and in pursuance of the power of sale. It

was held that the lease to N. was no impediment to the exercise of the power of sale. The approbation and consent of B. to the deed of H., were given by his writing at the foot of the deed, and directly following the signature of R., "I consent to the above," and subscribing his name thereto. It was held that this was sufficient approbation and consent under the power of sale in the will, and that questions touching the discreet exercise of the power of sale belonged to a court of equity, and that the deed to H. being valid on its face, so far as R.'s capacity to execute it was concerned, must so operate at law against the remainder-men, if executed in compliance with the directions of the will. A trustee, empowered in a will to make leases "for twenty-one years from the making thereof," must lease in possession, and if there is a valid outstanding term at the time a new lease is made for "twenty-one years from date," the lessee can enter only at the expiration of the existing term, and the new lease, being the grant of a reversion, is void. A lease executed and delivered on December 20, demising premises from the first of May following, for twenty-one years "from the day of its date," is a void execution of a power in a will to make leases for "twenty-one years from the making thereof," nor is it a case in which equity can aid the defective execution of a power and render this a valid lease in possession for twenty-one years from May first. A lease for twenty-one years, with a right for the lessee to renew for two similar terms at the same rate made under a power to lease for only twenty-one years, is not void, but a court of equity will sustain it for twenty-one years, and cut off the right to renew. A power given to a trustee to lease for the best improved rent obtainable, requires for its valid discharge reasonable diligence as well as good faith, and if it is shown that due diligence would have secured a much larger rent at the time of making a lease than is reserved, such lease is void.

lands jointly with others reserving a gross rent, is void.¹ So generally, if the donee of a limited power of leasing grants a lease *exceeding* the power, the lease is void and not susceptible of confirmation by the reversioner, unless otherwise provided by statute. But if the reversioner accepts rent under the lease after the death of the tenant for life, it is an admission that he is his tenant, and he is entitled to a notice to quit;² but if the reversioner has not accepted rent or recognized the tenancy, he may enter without notice or demand of possession.³ In granting a lease it is not necessary to refer to the power, as the only right to demise being conferred by the power, the lessor is understood as having reference to it in making the lease;⁴ but it is said that the intention to execute a delegated power must always appear in the execution thereof, either by a reference to the power itself, or by some rela-

Griffin v. Ford, 1 Bos. (N. Y. Supr. Ct.) 123. Where a will gives to executors a power to sell, and a codicil ratifies the will and adds a power to lease, and then orders all the rest and residue of the property, after certain legacies are paid, to be distributed among the children of the deceased, the order for division is not incompatible with the power of sale; but the executors may sell to pay debts or legacies, give full receipts to purchasers, and discharge them from looking after the purchase-money. A power to sell and a power to divide, in a will, are not incompatible, but the former is frequently necessary to execute the latter, and hence a power to sell, not expressly given, may be implied as incidental to that of division. A general power to sell given to five executors as such, and not as individuals, and their survivor or survivors, is well executed by two, if one of the others refused to serve and two are dead, for the power vested in the survivors. Conover v. Hoffman, 1 Bos. (N. Y. Supt. Ct.) 214.

¹ Williams v. Matthews, 5 B. & Ad. 755.

² Martin v. Watts, 7 T. R. 83; S. C. 2 Esp. 501; Wright v. Smith, 5 Esp. 208; Pennington v. Tan-

niere, 12 Q. B. 998; Potter v. Archer, 1 B. & P. 531; Tucker v. Moore, 1 B. & Ad. 365; Collins v. Weller, 7 T. R. 478. But inequity acceptance of rent does not amount to a confirmation of the lease. Bowers v. East London, &c., Co., Jac. 324.

³ Briggs v. White, 2 D. & R. 719.

⁴ Porcher v. Daniel, 12 Rich. (S. C.) Eq. 349. Nor is it necessary to recite either the power or the terms of the appointment. It is enough if there be such a dealing with the estate as can be effectuated only by virtue of the power. Campbell v. Leach, Amb. 748. The rule is that, if the instrument will work two ways, the one way by interest and the other way by authority or power, and it is indifferent whether it work one way or the other, the law will attribute it to the interest, and not to the authority; but, where interest and authority meet, if the party clearly declare that it shall take effect by virtue of his authority or power, then such expressed intention will prevail against interest for *modus conventio vincunt legem*. Brekley v. York, 6 East 86; Hob. 159, and if the lease, if construed to be derived out of the interest, would have some effect, but not all intended by the parties, then, in or-

tion to the subject matter of it, in a way which can leave no doubt of such intention.'

The grantor of a lease under a power need not be in the *actual* possession of the premises, but a constructive possession, by the receipt of the rents and profits, is sufficient; as, if actual possession was essential, a leasing power could never be executed where the lands were in the possession of a tenant.'

SEC. 149. What kind of leases may be granted.—Power to lease for lives or years, may be executed by a lease either absolutely for certain lives, or conditionally for a number of years, determinable upon a life or lives.' So where power is given to make leases for the lives of three persons, he may make a lease to them for their three lives, or to the longest liver of them.' So a lease to one for three lives, or to three for their lives, is good.' But a power to make a lease for three lives does not warrant a lease for ninety-nine years, determinable upon three lives.'

der to effectuate the main design, the estate will pass under the power. 1 Vent. 228; Campbell v. Leach, Ambl. 748; Thomlinson v. Dighton, 10 Mod. 36; 1 Salk. 239; Andrews v. Brumfield, 32 Miss. 107.

¹ Davis v. Vincent, 1 Houst. (Del.) 416. In Myers v. McBride, 18 Rich. (S. C.) L. 178, a wife having power under a marriage settlement to convey the land by deed of herself and husband, not purporting to be in execution of the power and without a valid release of her inheritance, was held not to convey her title to the land. See also Gee v. Graves, 2 Head. (Tenn.) 289, where it was held that there must be something to show that the party intended to execute it.

² Hall v. Buckley, 1 Doug. 292; Rodgers v. Wallace, 5 Jone (N. C.) 9 L. 181.

³ Commons v. Marshall, 6 Bro. P. C. 168. Sugden on Powers, 409, 737.

⁴ Alsop v. Pine, 3 Keb. 44; Doe v. Dardwicke, 10 East, 549; Bacon's Abr. Tit. Leases, (I.) 11.

⁵ Baugh v. Haynes, Cro. Jac. 76.

⁶ Whitlock's Case, 8 Coke, 69 b.; Rattle v. Popham, 2 Stra. 992. In Zouch v. Wallaston, 8 Burr. 1147; LORD MANSFIELD said, that in Rattle v. Popham, ante, the court thought themselves bound by the resolution in Whitlock's Case, and held the lease not to be warranted by the power. The widow brought her bill in chancery, and LORD TALBOT, reasoning from the same premises, held the lease to be warranted by the power. He said it was not a defective, but a blundering execution. In Shannon v. Bradstreet, 1 Sch. & Sef. 71; LORD REDESDALE said, that if LORD MANSFIELD found fault with the decision in Rattle v. Popham, as he was represented to have done, he thought, with deference, there was no ground for the remark. From a MSS. note of the case, to be found in the appendix to Sugden on Powers, No. 20, it will be seen that LORD TALBOT admitted that the power was not well executed at law, but relief was given against the defective execution upon the general rules of equity. In Rae v. Prideaux, 10 East, 452, where the power authorized a

MR. WOODFALL, in his work on Landlord and Tenant, pp. 157-168, says: "Where, by marriage settlement, the husband had the wife's estate for life, with a power to grant leases for twenty-one years, but no longer, and in breach of the power, he granted a lease to A for ninety-nine years, determinable upon lives; and the wife survived him, and conveyed the fee to B; and in the conveyance was recited the lease to A, who was recognized as being then tenant in possession of the estate, at the yearly rent reserved: on an action of ejectment brought by B against the assignee of the lease, it was held that the

lease for any number of years not exceeding twenty-one, or for the life or lives of any two or three persons, so as no greater estate than for three lives be at any one time in being in any part of the premises; it was held that the power authorized a lease for years, but not a lease for years determinable upon lives, and that a lease by a tenant for life for ninety-nine years, determinable on lives, as it might exceed twenty-one years, was void at law, and was not good even *pro tanto*. The court relied on Whitlock's Case and Rattle v. Popham, ante, as expressive of good law. MR. SUGDEN, in his work upon powers, 458, says: "The result of all the authorities appears to be that, subject to the distinction taken in Whitlock's Case, where a freehold interest is authorized to be appointed under a power, a different species of estate, although less valuable as a term for ninety-nine years determinable with the life, cannot at law be granted: but that in equity, such an execution will be supported *because less than the power is effected*, and it clearly appears how much less." Equity will support the exercise of a power, where the donee thereof is clothed with discretion as to its exercise, when it appears that he acted fairly and honestly, although mistakenly. Thus a testator directs, in his will, that his wife shall retain possession of his farm for five years after his death, the family to be kept together, and the plantation managed by her, and

certain kindred supported by her; and he provides means to enable her to conduct the farm. By a subsequent clause he authorizes his executor "at a proper time, say at the expiration of five years from the time of my decease," (but expressing a desire that his wife retain possession longer, if for the interest of the family), to dispose of all his estate in fee simple, and as each child comes of age to pay him or her a distributive share. The widow lives on the farm till the expiration of the five years, when, the oldest child being within a few months of twenty-one years of age, the executor offers the land for sale. Held, that the executor, acting in good faith, and being of opinion that the interests of the family required a sale, which opinion was not contravened by evidence, it would be an improper exercise of power in a chancellor to interfere and substitute his own discretion for the executor's, when the power has not been exceeded. Dixon v. McCue, 14 Gratt. (Va.) 540. Equity may aid the defective execution of a power, but not a non-execution. Howard v. Carpenter, 11 Md. 259. In Isherwood v. Oldknow, 3 M. & S. 382, the court held that when a power authorized a lease for twenty-one years, without saying for any time not exceeding twenty-one years, a lease may be made for *fourteen*, or any number of years less than twenty-one, and the covenants enure to the reversioner.

lease was void, and the recital only matter of description.¹ Under a power to lease for years or lives, with or without covenants for renewals, leases for 999 years are valid.² A man having a power may do less than such power enables him to do; or, if he do more, it shall be good to the extent of his power; thus, if a man have power to lease for ten years, and he lease for twenty years, the lease for twenty years shall be good for ten years of the twenty in equity.³ A lease for fourteen years is warranted by a power to lease for twenty-one years.⁴ A power to lease for any term or number of years certain, not exceeding twenty-one years, will warrant a lease for twenty-one years, determinable at the option of the lessee at the end of the first seven or fourteen years.⁵ A power to lease for three lives may be executed by a lease for two lives.⁶ Power to lease for any term not exceeding three lives *and* forty-one years will warrant a lease for three lives and forty-one years, to commence from the 1st of November preceding the day of the death of the survivor of the *cestui que vie*.⁷ A tenant for life, having power to grant building leases for sixty-one years, reserving the best improved ground rent, granted a lease for that term, which was not expressed to be a building lease, but which contained a covenant by the lessee to keep in repair the premises demised (old houses) or such other "house as should be built during the term:" it was held, that this was not a building lease within the power, and that such a lease being granted by tenant for life, who had a bare naked power without any legal interest, was void, and not capable of being confirmed by acceptance of rent by the remainder-man.⁸ So a power to grant long leases "for

¹ Biggs v. White, 2 D. & R. 716.

² Sug. Pow. 744; Lord Muskerry v. Chinnery, 2 D. & R. 932; Muskerry v. Sheeny, 1 H. L. Cas. 576; Sug. H. L. Cas. 465.

³ Mayor of London v. Tench, 7 Mod. 173; 12 & 13 Vict. c. 26, s. 2.

⁴ Isherwood v. Oldknow, 3 M. & S. 382; Easton v. Pratt, 2 H. C. 676; 33 L. J., Exchq. 233.

⁵ Edwards v. Milbank, 4 Drew. 606; 29 L. J., Ch. 45; Sug. Pow. 742.

⁶ Sug. Pow. 746, pl. 26.

⁷ Re Crommellin Estate, 1 Ir. Com. L. R., N. S. 182; Sug. Pow. 746.

⁸ Jones d. Cowper v. Verney, Willes, 169; Sug. Pow. 738.

the purpose of new building or effectually rebuilding *and* repairing any messuage, &c., being or to be on the premises," is not well executed by a lease containing a covenant *effectually to repair*, as it is not equivalent to a covenant *effectually to rebuild and repair*.¹ But a power to grant leases for twenty-one years, or building or repairing leases for 61 years, is well executed by a lease for forty years containing the usual covenants to repair and keep in repair the demised premises, and so to leave them at the end of the term.² In this case there was no absolute covenant to put in repair, or to expend any definite sum in repairing, nor was the lease expressed to be granted in consideration of any such outlay.³ Upon a power to grant building leases, such a lease expressly exempting the lessee from rebuilding in case of fire, and by another clause enabling him to surrender the lease upon notice, could not be sustained.⁴ Lands held on a lease for lives, renewable forever, were settled on one for life, with a power for him and all other persons to whom any use was limited, when in actual possession, to demise for any number of lives or years consistent with their respective interests therein, to commence in possession and not in reversion, reserving the best rents without taking any fine: the tenant for life granted a lease at a farm rent for the lives of three persons named, with a covenant that on the failure of any of the lives, the lessor, his heirs and assigns, would, on payment of five pounds as a fine, add to the time and term of the lease another life from time to time forever; held that the lease was not warranted by the power.⁵ Under a power to a tenant in possession to let all or any part of the premises, so as the usual rents be reserved, a lease of tithes, which had never been let before, was held void.⁶ A lease under a power to lease in possession or reversion, for one life or for two or three lives, or for any term or

¹ Dymoke v. Withers, 2 B. & Ad. 896.

⁵ Clarke v. Smith, 9 Cl. & F. 126.

² Easton v. Pratt, 2 H. & C. 676.

⁶ Pomeroy v. Partington, 2 T. R. 665, Sug. Pow. 731, pl. 12.

³ Id. 678.

⁴ Sug. Pow. 743; Stiles v. Cowper, 3 Atk. 692.

number of years determinable upon one life or two or three lives, any part of the premises usually so letten, does not authorize a lease at a single rent of premises under the power, together with other premises to which the power does not extend; but joining different lands in one lease which are all under the power, though they had never before been let by a single demise, is not objectionable.¹ A power to demise lands or any part with of them is not well executed by a demise of part liberty of shooting over the whole.² But the right to shoot and fish over the lands demised may be excepted and reserved to the lessor and his assigns.³ If a tenant for life make a lease without taking notice of his power, it shall be an execution of his power to make leases; for otherwise the lease shall not have an effectual continuance.⁴ If a man having a power annexed to his estate, charge his estate, and afterwards execute his power, the estate which rises by the execution of the power shall be subject to the charge during the estate; as if a tenant for life, with power to make leases, grant a rent-charge, and afterwards make a lease, the lessee shall take subject to the rent-charge during the life of the lessor.⁵

SEC. 150. In whom powers may vest.—If the power be a man and his assigns to make leases, &c., it may be exercised *toties quoties*,⁶ and will run with the estate to the assignee in deed or in law, and go to his executor, or to the assignee of the executor;⁷ or to his heir, together with the estate.⁸ It is no objection to a lease under a power, that it is in trust for him who executes the power; provided the legal tenant be bound during the term in all requisite covenants and conditions.⁹ But where, by a mar-

¹ Earl of Egremont v. Stephens, 2 Q. B. 208; Doe d. Earl of Egremont v. Williams, 11 Q. B. 288.

² Dayrell v. Hoare, 12 A. & E. 356.

³ Goodtitle v. Funucan, 2 Doug. 566.

⁴ 1 Ventr. 228.

⁵ Sabbarton v. Sabbarton, Cas. temp. Hardw. 415.

⁶ Sug. Pow. 718.

⁷ How v. Whitfield, 1 Vent. 340; Freeman, 476.

⁸ *Ex parte* Cooper, Re North London R. Co., 34 Law J., Ch. 373.

⁹ Atkins v. Horde, 1 Burr. 124; Wilson v. Sewell, 1 W. Blac. 617; 4 Burr. 1975; Earl of Cardigan v. Montague, Sug. Pow. 918; Bevan v. Hapgood, 1 Johns. & H. 222; 30 L. J. Ch. 107.

riage settlement, a power was given to the wife, after the death of her husband, to grant leases for twenty-one years, reserving the best rent, &c., it was held that a lease by the wife to a second husband was not a good execution of the power.¹ Where trustees are invested with a power of leasing, they must exercise it in like manner as a trust to let.² Where devisees in trust, with discretionary powers, disclaim, and the trust estate descends to the heir, he cannot exercise any of the discretionary powers, such as granting leases, &c.³ Where the heir of a surviving trustee is the proper party to demise, a lease granted by the executors of such trustee is void.⁴ By a private act, being an act to confirm a marriage settlement of lands made by the Earl of Shrewsbury, power was given to the persons entitled in possession for the time being to the use of such lands, to demise and lease all or any part of the lands for a term of three lives or for a lease of twenty-one years, provided the usual or accustomed rent were reserved. By a subsequent private act, all the estates of the Earl of Shrewsbury were vested in trustees for sale, and for laying out the money to arise from such sale in the purchase of other lands, to be settled to the same uses; and it provided, that, until the lands were sold in pursuance of the trust directed by the act, the same should be held, possessed and enjoyed, and the rents, issues and profits should be had, received and taken by the person who ought to have held and enjoyed the same if the act had not been passed: held, that this act did not preserve the leasing power contained in the first act, so as to enable the tenant for life to grant leases of the lands which might remain unsold.⁵ By a private act of parliament, lands were, in 1720, settled on those who should be Earls of Shrewsbury. In 1803, a portion of these estates, by another act, was vested in trustees for sale, freed from

¹ Doe d. Hartridge v. Gilbert, 5 Q. B. 423.

² Sutton v. Jones, 15 Ves. 588; Sug. Pow. 722.

³ Robson v. Flight, 34 Law J., Ch. 226; 13 W. R. 393.

⁴ *Ex parte* Cooper, *Re* North London R. Co. 34 Law J., Ch. 373.

⁵ Earl of Shrewsbury v. Keightley, 19 C. B. N. S. 606.

the uses of prior act, with a provision that till sale they should be held for the benefit of those who but for the act would be entitled. In 1843, by a third act, which provided for the sale of another portion of the estates, it was also provided that those to whom the estates limited by the first act were successively limited, when by virtue of the limitations they came into possession or were entitled to the profits of the lands which should for the time being stand limited and settled to such of the uses of the first act as should then be subsisting or capable of effect, might lease them in a particular way: held, that this power of leasing extended to lands vested in trustees under the second act, and still unsold.¹

SEC. 151. Usual covenants. Proviso for re-entry. Counterpart.—Where the settlement creating the power makes no mention of the covenants to be contained in the leases, any covenants may be inserted or omitted according to the agreement of the parties, provided they do not amount to a fraud on the power by lessening the value of the reversion.² In general there must be a covenant for payment of rent as well as a reservation of the rent; for under a mere reservation, it cannot be payable till entry, and therefore, in fact, may never be payable during the term: besides, if there be no covenant to pay the rent, the lease may be assigned to a succession of beggars.³ There must also be a clause of re-entry, else the ground may be unoccupied without any, or at least a sufficient, distress upon it, so that the remainder-man can neither have his rent nor his land.⁴ The lessee should always be required to execute a counterpart or duplicate of the lease, even where that is not expressly prescribed by the power; as is generally the case.

SEC. 152. Leases in possession or reversion.—In all well drawn powers of leasing, where it is intended that a lease in reversion may be granted, it is expressly declared so;

¹ *Earl of Shrewsbury v. Beazley*,
10 C. B., N. S. 651.

² *Goodtitle v. Funucan*, 12 Dougl.
575.

³ *Atkins v. Horde*, 1 Burr. 125.

⁴ *Douglas v. Lock*, 2 A. & E. 705.

and if a reversionary lease is not to be granted, it is expressly declared that the lease shall be made to take effect in possession, and not in reversion, or by way of future interest.¹ Upon a general power to make leases, without saying more, the law adjudges that the leases ought to be leases in possession, and not leases in reversion, or in futuro; for if upon such power a lease might be made upon a lease, the party might, by making infinite leases, detain those in remainder out of possession forever; which would be contrary to the intent of the parties and against reason.² A general power to make leases for one-and-twenty years, does not enable the party to make such a lease in reversion.³ Under a power to make leases to one, two or three persons, the donee of the power cannot make a lease for the life of the first (unborn) son of J. S.⁴ A power to trustees "to lease premises for a term not exceeding twenty-one years, and determinable as a former term of ninety-nine years was determinable," was held to authorize a lease in possession only, and not in futuro; and as the trustees had let the premises for ten years, determinable as in the original lease, and afterwards relet them for the term of eleven years, before the expiration of the ten years' lease, the last lease was held void, and a bad execution of the power.⁵ A tenant for life, having power to lease for ninety-nine years from the time of executing, so as that such lease or leases, be made to take effect in possession, or immediately after the determination of the leases then subsisting, reserving the best and most beneficial yearly rents to be incident to the immediate reversion, in pursuance of one entire bargain, granted, at the same time, in 1787, two leases, one for thirty years, to commence from October, 1791, on the expiration of an existing lease, and the other for sixty-three years from October, 1821: it was held, that the second lease was void.⁶

¹ Sug. Pow. 747.

² Sheecomb v. Hawkins, Cro. Jac. 318; Yelv. 222.

³ Countess of Sussex v. Wroth, 426, Cro. Eliz. 5; Sug. Pow. 749-752.

⁴ Snow v. Cutler, T. Raym. 168.

⁵ Shaw v. Summers, 8 Moo. 196.

⁶ Sutton v. Harvey, 1 B. & C.

SEC. 153. **On what Land they attach.**—If there is a power to make leases expressly stated to be in possession, which attaches upon an estate, part of which is in possession and part in reversion at the creation of the power, the donee of the power may immediately make leases in possession of the estate in reversion, as well as of that in possession; for in such case the word “possession” in the power refers to the lease, and not to the land:¹ but it seems, that if a power enable any one to make leases in reversion as well as in possession, and some parts of the lands subject to the power be in possession, and other parts of it in reversion, he cannot make a lease in possession and another lease in reversion of the same land; but his power to make leases in reversion will be confined to such land as was not then in possession.²

SEC. 154. **What is a Lease in Reversion.**—Where there is a power to grant leases in possession only, a lease in possession is not contrary to the power, although the estate at the time of granting the lease was held by tenants at will, if, at the time, they receive directions from the lessor to pay their rent to the lessee, to which they assent.³ Where a tenancy from year to year has expired, but the out-going tenant has a customary right over part till a future day, a lease in possession may be granted.⁴ Where one under a power to lease for twenty-one years in possession, but not in reversion, granted a lease to his only daughter for twenty-one years, “to commence *from* the day of the date”; it was adjudged a good lease, as the word “from” may mean either inclusive or exclusive, according to the context and subject-matter, and the court will construe it so as to effectuate the deeds of parties, and not to destroy them. But

¹ Powell on Powers, 425; Bac. Abr. tit. Leases (I.); Fox v. Prickwood, Cro. Jac. 347; 2 Roll. Abr. 200, pl. 5; Sug. Pow. 755.

² Bac. Abr. tit. Leases (I.) 11.

³ Clarges v. Funucan, 2 Doug. 565; Bac. Abr. tit. Leases (I.) 11; Sug. Pow. 762.

⁴ Snowden, 2 W. Blac. 1224;

Doe v. Calvert, 2 East, 576; Sug. Pow. 763.

⁵ Pugh v. Duke of Leeds, Cowp. 714; Freeman v. West, 2 Wils. 765; Denn v. Fearnside, 1 Wils. 176; Atty.-Gen. v. Countess of Portland, Cowp. 723; Sug. Pow. 760, 761.

if made to commence only a day after the execution of the lease, it was not good at common law or in equity as a lease in possession.¹ Under a power to demise for twenty-one years in possession, and not in reversion, a lease dated 17th February, 1802, to hold from the 25th of March next ensuing the date thereof, is good, if not executed and delivered till after the 25th of March, for it then takes effect as a lease in possession, with reference back to the date actually expressed :² but under a power to lease in possession and not in reversion, a lease for years executed on the 29th of March to the then tenant in possession, to hold as to the arable land from the 13th of February preceding, and as to the the pasture from the 5th of April then next, under a yearly rent payable quarterly on the 10th of July, 10th of October, 10th of January and 10th of April, was held void for the whole ; though such leases were according to the custom of the country, and the same had been before granted by the person creating the power.³

SEC. 155. Effect of existing leases.—The circumstance of the second lease for years being granted to the same lessee who holds under a former lease, to commence after the expiration of such former lease, does not operate to make the latter a continuation of the former lease, where the terms are granted by different deeds ; although the residue of the time to come after the former lease, together with the period for which the latter lease is granted, do not in length of time exceed the limits fixed by the power ; for the latter will notwithstanding be considered as a reversionary lease, as much as if it had been granted to a reversionary lessee.⁴

SEC. 156. Leases in Possession or Reversion.—If a man have power to make leases in possession or reversion, and

¹ Pollard v. Greenville, 1 Ch. Cas. 10 ; 1 Ch. Rep. 184 ; Calvert, 2 East, 375 ; Bowes v. East London Water Works Co., Jacob, 374 ; Sug. Pow. 760.

² Cox v. Day, 10 East, 427 ; Sug. Pow. 761, pl. 43.

³ Allen v. Clavert, 2 East, 376.

⁴ Doe d. Pulteney v. Lady Cavan, 5 T. R. 567 ; Smith v. Day, 2 M. & W. 684.

he make a lease in possession once, he shall never afterwards make a lease in reversion, for he has an election to do the one or the other, but not both. Under a power to lease in possession for lives, or for years determinable on lives, a man cannot make an absolute lease in possession for years; but he may make an absolute lease in reversion for years.¹ Where powers were given to make leases of present but not of future interest, and so as the same should go with and be incident to the remainder and reversion; a lease with a reversion in execution of those powers to the tenant in possession of the freehold, his heirs and assigns, was held good, because "heirs and assigns" meant those to whom the remainder and reversion would go.² Where one having power to make leases for twenty-one years in possession made a lease to A for twenty-one years in trust for the payment of debts, but the lease was made to commence from a time to come, and so not pursuant to the power, yet being made for the payment of debts, it was supported in equity.³

SEC. 157. *What are usual Covenants within such Powers.*—What are *usual covenants* in a lease, under a power requiring such covenants, is a question of fact for the jury, and not for the court.⁴ It depends on what are the usual and customary covenants of the neighborhood;⁵ but it has been held, that what are the "usual and reasonable covenants" must depend on the leases of the same land in existence at the time of the creation of the power.⁶ Where a power to lease was given upon reserving the ancient, usual and accustomed rents, heriots, boons and services; a covenant "to keep in repair" was held to be "an ancient boon," and the omission of it was deemed fatal.⁷ Where there was a power to tenants for life to lease for years,

¹ Winter v. Loveday, 1 Ld. Raym. 267; 9 Salk. 537.

² Hotley v. Scott, Lofft, 316.

³ Pollard v. Greenvil, 1 Ch. Cas. 10; 1 Ch. Rep. 184.

⁴ Clarges v. Funucan, 2 Doug. 565; Bennett v. Womack, 3 C. & P. 96; 7 B. & C. 627; Powell on Powers, 578.

⁵ Boardman v. Mostyn, 6 Ves. 467, 171; 4 Jar. Prec. 297 (3rd. ed.)

⁶ Earl of Egremont v. Stephens, 6 Q. B. 208; Smith v. Doe d. Earl of Jersey, 7 Price, 281; Doe d. Earl of Egremont v. Williams, 11 Q. B. 688.

⁷ Earl of Cardigan v. Montague, Sug. Pow. 918 (8th. ed.)

with the usual covenants, &c., it was held, that a lease made by him, containing a proviso, that in case the premises were blown down, or burned, the lessor should rebuild, otherwise the rent should cease, is void, the jury finding that such covenant is unusual ;¹ so a covenant not to assign without license does not come within a contract to grant a lease with common and usual covenants.² Where the settlement creating the power does not require the usual covenants to be inserted in the leases, any covenants may be inserted or omitted, as agreed on, provided they do not amount to a fraud on the power.³

SEC. 158. *Ways, &c.*—A private act of parliament enabled a tenant for life to grant building leases, and “to lay out and appropriate any part of the land authorized to be leased as and for a way or ways, street or streets, avenue or avenues, square or squares, passage or passages, sewer or sewers, or other conveniences for the general improvement of the estate and the accommodation of the tenants thereof.” A tenant for life having appropriated certain land, and laid it out for a way for the general improvement of the estate, in exercise of the powers of the act, by deed granted rights of way over it to two several tenants : held that tenants under other leases granted in pursuance of the act, but containing no grant by deed of a right to use the way, were not entitled by the provisions of the act to use it.⁴

SEC. 159. *Power to grant leases with a proviso for re-entry.*—A power to tenants for life to grant or renew leases for lives, provided that a right of re-entry is reserved upon such leases for non-payment of rent, is well executed by a lease for lives, providing a re-entry in case the rent remains in arrear fifteen days, *and there is no sufficient distress upon the premises*, the conditional proviso being the usual form in leases.⁵ Where a power of leas-

¹ *Ellis v. Sandham*, 1 T. R. 705 ;
Yellowly v. Gower, 11 Exchq. 274.

² *Bro. C. C.* 632.

³ *Goodlittle v. Funucan*, 2 Doug.
575.

⁴ *White v. Leeson*, 5 H. & N. 56 ;
29.

⁵ *Smith v. Earl of Jersey*, 5 M.
& S. 467 ; *Lord Tankerville v.*
Wingfield, 7 Price, 343 ; but see
contra, *Coxe v. Day*, 13 East 118.

ing required the insertion in the lease of a clause of re-entry for non-payment of rent, and a lease was made with a proviso for re-entry if the rent should be *forty-two* days in arrear, it was held such a lease was valid.¹ But a lease with a proviso for re-entry, if the tenant should suffer the premises to be out of repair, and should not repair the same *within six months next after notice*, was held bad, the clause as to notice not being usual.²

SEC. 160. What lands are considered as having been lands usually let.—In modern settlements the power of leasing usually extends to all the hereditaments therein comprised; and if the mansion-house or any other part is not intended to be let, it is expressly excepted.³ Where leases are granted under powers to lease lands “usually demised,” it must be shown by old leases or other satisfactory evidence that the lands have usually been demised; or otherwise they cannot be supported.⁴ Lands not demised for the space of twenty years before the execution of a power to demise at the rent then usually reserved and paid, cannot be leased under such a power.⁵ Where the power was to extend to land usually demised, it was held, that land settled for years, determinable on lives, by a family settlement, came within that description;⁶ so are lands which have been previously let two or three times, but not lands which have been let only once for a short term; if lands have been let by virtue of a contract from year to year for three years, they cannot be said to have been usually demised;⁷ but lands which have been held under a lease for a long term may be said to have been usually demised, within the meaning of the power.⁸ It is not necessary that the land should have been demised by indenture; a demise at will, or by copy, is sufficient to make land to be accounted usually

¹ *Rutland v. Wythe*, 5 M. & W. 688; 12 id. 355; 10 Cl. & F. 419.

² *Earl of Egremont v. Burrough*, 6 Q. B. 229.

³ *Sug. Pow.* 727 (8th ed.).

⁴ *Id.* 735; *Earl of Cardigan v. Montague*, id. 918.

⁵ *Tristan d. Gore v. Baltinglas*,

Vaugh. 28; *T. Jon.* 27; *Sug. Pow.* 728, 729.

⁶ *Right d. Basset v. Thomas*, 1 W. Blac. 446; 3 Burr. 1441, 1448.

⁷ 2 Roll. Abr. 261; *Sug. Pow.* 728.

⁸ *Sug. Pow.* 728; *Vaughan*, 28.

demisable ;¹ and a covenant to stand seized, may amount to a sufficient demise.² Under a power in a will, "to demise and lease such parts of the testator's premises as had been usually granted or demised, and were then in lease, for any term of years determinable on lives, to any persons, for the like terms, and in like manner, and under the like rents, services and conditions as the same had been usually granted ; and the residue of the same premises, unto any persons, for any term of years not exceeding twenty-one years in possession, at the best and most improved rent that could be reasonably gotten for the same, so as that no *such* demise or lease should be made punishable for waste, nor without a condition of re-entry on non-payment of the rent or services thereby reserved, and so as each lessee should execute a counterpart of his lease:" it was held, that the word "*such*" could not be thrown back, so as to apply to or govern the first class of the testator's premises, which had been usually let and were then in lease, but must be confined to the latter class of property, viz., the residue of the premises, as to the terms of leasing which the testator had given separate and specific directions :³ also that a lease under the power of lands which were in lease at the time of the creation of the power (the second lease accurately following the terms of the former lease of the same lands) was well executed under such power, although the second lease did not contain a clause of re-entry on non-payment of 40s. reserved in lieu of a heriot ; the first lease containing no clause of re-entry on non-payment of a like reservation.⁴ In a settlement of personal property the parties covenanted to settle all future-acquired property upon the same trusts, &c. ; held, that this authorized the insertion of a power to grant mining leases in the settlement of subsequently-acquired freeholds, the prior owner having granted such leases, though the mines had never been effectually worked.⁵

¹ Powell on Powers, 392 ; Sug. Pow. 730.

² Basset v. Thomas, 3 Bur. 1441, 1447, 1 W. Blac. 446.

³ Bligh v. Colman, 1 Bing. 28.

⁴ Ibid.

⁵ Scott v. Steward, 27 Beav. 367.

Under a power of leasing "for one, two or three lives, or for any term of years determinable on one, two or three lives, such lands as were then demised for any such term," lands are not included which were then held under a demise to "W and G for ninety-nine years, if W and his widow, and any eldest son living, or in *ventre sa mere* at the time of his (W's) death, or if no son, any eldest daughter then living or in *ventre sa mere*, or any or either of those three, viz., of the said W and such his wife, son or daughter, should so long live, remainder to the said G and his widow, son or daughter, in the same manner," of which description of persons five were in fact living at the time of the power reserved, who were all entitled in succession, three at a time, to come in under the lease: under such a general power the three lives must be certain and co-existing.¹

SEC. 161. Whether lands not before in lease may be demised.

—It seems now to be settled that the question—whether lands not before in lease may be demised under a power to lease lands and other hereditaments, provided that such rent or more be reserved upon every lease as has been reserved, or paid for it, within a given time previous to the creation of the power,—is a question of construction on the intention of the author of the power, to be collected from the instrument creating the power, and the circumstances of the estate.² Thus, where there was a power to lease a manor, except the demesne lands, it was held that copyholds, though within the description, could not be demised: yet that the rents and services of the manor might, notwithstanding a qualification annexed to the power, which said that the ancient rent should be reserved, and there could be no reservation of rent upon a lease of rents and services out of which no rent issues: for it appeared to be the intent of the settlement, that part of the manor should be demisable.³ Under a power in a family settle-

¹ Wyndham v. Halcombe, 7 T. R. 718.

² Powell on Powers, 402; 2 Roll. Abr. 262; Wakeman v. Walker, 3 Keb. 597; 1 Vent. 294; 2 Lev. 150.

³ Loveday v. Winter, 5 Mod. 245, 378; 12 Mod. 148; 1 Comb. 87; 1 Ld. Raym. 267; 2 Salk. 537; Leigh v. Earl of Balcarres, 6 C. B. 847.

ment to make leases of all or any part of the premises, reserving the ancient rent, lands always occupied with the family seat cannot be demised ; for in such case the qualification annexed to the power, "that the ancient rent must be reserved," manifestly excludes the mansion-house and lands about it *never* let : the nature of the thing in such case speaks the intent.¹ So, under the settlement of an estate, with a power to the tenant in possession to let all or any part of the premises, so as the usual covenants be reserved, a lease of tithes which had never been let before was held void. In all these cases the intention of the parties is to govern the court in construing the powers.²

SEC. 162. *Whether such leases are good for part only.*—Where there was a devise of lands to trustees and their heirs, in trust to the use of a man and his first and other sons in strict settlement, remainder to another and his first and other sons in strict settlement, with power to the trustees from time to time, during the minorities of the persons to whom the premises should descend, and to any tenant for life, to grant any *lease of all or any part of the lands so limited, so as there be reserved the ancient and accustomed yearly rent, &c.*: a lease of part of the lands devised, in several parcels, in one of which parcels were included, together with lands anciently demised, two closes never before demised, at one entire rent, viz., the ancient rent for that part which had been anciently demised, was held to be void for the whole of the lands included in that parcel, as well the lands never before let as those anciently let ; but it was considered good as to the other parcels, which contained only lands anciently demised, and on each of which there was a *separate* reservation of the ancient rent.³ Where lands were demised to a person for life, with power to lease for lives all but a certain excepted portion, reserving the like rents

¹ Baggott v. Oughton, 8 Mod. 249 ; Fortescue, 332 ; Goodtitle v. Funucan, 2 Doug. 574.

² Pomery v. Partington, 3 T. R. 665.

³ Barlett v. Rendle, 3 M. & S. 99 ; Fuller v. Abbott, 4 Taunt. 105.

as were then reserved, or more, the rents then being 29*l.*; and the devisee made a lease for three lives at the yearly rent of 40*l.* of the lands within the power and part of the excepted lands; it was held that the rent could not be apportioned, and that the lease being void for the excepted lands was void as to all.¹ But where a lease was held void because lands under a power were let together with other lands not under the power, it was held that the lease was good as to the latter lands against the heir of the lessor.²

SEC. 163. **Execution of powers to infants, lunatics, feme covert, &c.**—An infant cannot execute a power unless the donor expressly declares that infancy shall not disqualify.³ A power delegated to a *feme sole* who subsequently becomes a *feme covert* is not suspended by her coverture, but she and her husband may effectually execute it, but, she alone, unless otherwise provided by statute, cannot execute it.⁴ Except where the statute confers the authority upon a committee of a lunatic, if a donee of a power becomes a lunatic before the power has been exercised, it cannot be exercised during his lunacy,⁵ and a court of equity has no power to substitute the consent of his committee,⁶ but where the statute provides that, where any person, being a lunatic, shall be seized or possessed of lands, &c., the power of leasing, &c., shall be vested in his committee, the power is exercisable by them.⁷ Where the donee of a power dies without having executed it, it becomes inoperative.⁸ When the purpose for which a power was

¹ Williams v. Matthews, 5 B. & Ad. 298.

² Lord Egremont v. Stephens, 6 Q. B. 208.

³ 1 Platt on Leases, 401; Hearle v. Greenbank, 3 Atk. 695-710; Grange v. Tiving, O'Briodyn by Barn. 116; *Ex Parte*, The Committee of Lord Bradford, Co. Temp. Hardw. Ch. 113.

⁴ Bagley v. Warburton, Com. 494; Grange v. Tiving, ante; Harris v. Graham, 1 Roll. Ab. tit. Authority (B.) pl. 12; Daniel v. Uply, Latch. 9; Dighton v. Tomlinson, Com. 194.

⁵ Grange v. Tiving, ante; 1 Sugden on Powers, 19 (6th Ed.).

⁶ *Ex Parte* Smyth, 2 Swanst. 390.

⁷ *Ex Parte* Smyth, ante. The donee of a power in whose discretion special confidence is reposed, cannot act by another, sane in those matters not requiring the exercise of judgment. Singleton v. Scott, 11 Iowa, 589.

⁸ *Ex Parte*. The Committee of Lord Bradford, ante.

⁹ Hotchkiss v. Etting, 36 Barb. (N. Y.) 38, but this is not so when the power is given to executors by official designation. In such case,

given has been accomplished or becomes *impossible* of execution, it ceases.¹

SEC. 164. **Statutory powers.**—Where powers are derived under a statute, whether general or special, the extent of the power, as well as the rules and directions for its execution, must be sought for in, and must conform to, the statute.²

the power survives, unless the power is expressly joint. *Davis v. Christain*, 15 Gratt. (Va.) 11; *Beate v. White*, 2 Head. (Tenn.) 703.

¹ *Smyth v. Taylor*, 21 Ill. 290.

² *Baltimore v. Porter*, 18 Md. 284. The New York statutes of 1830, relating to active trusts, limit and define the cases in which the estate and title can be given to one to be used for the benefit of another; but it expressly provides that limitations in trust not within the allowed cases shall be effectuated by holding the limitation to be a grant of a power to be used for the purposes designated, if those purposes can be attained by means of a power. The statute does not limit the purposes for which a power may be created, and where limitation by way of trust is invalid under the statute, but when the desired object can be accomplished by means of a power,

which is not forbidden by statute, the apparent trust will be construed as a grant of a power. Manufacturing establishments can be carried on by means of a power in the trustees, as well as by vesting the legal estate in them, and a direction to sell those establishments at a certain specified time, or sooner, at the direction of the trustees, and to distribute the proceeds, does not require a legal estate in the trustees, but may be carried out by means of a power. *Downing v. Marshall*, 23 N. Y. 366. Where a sale of a lottery privilege was made by agents or managers under an authority conferred by the legislature, it was held, that the authority must be strictly pursued; and if departed from, no acquiescence of the parties to the contract, or the parties interested, can render it valid. *Gregory v. Shelby College*, 2 Met. (Ky.) 589.

CHAPTER XXII.

BY TRUSTEES.

- SEC. 165. Generally.
- SEC. 166. Powers of *cestui que trust*.
- SEC. 167. For what term trustees may lease.
- SEC. 168. Confirmation of imperfect lease by *cestui que trust*.
- SEC. 169. Trustee not liable for loss, when.
- SEC. 170. Trustee cannot be compelled to specifically perform contracts of his grantor, when.
- SEC. 171. Cannot subject property to his own debts.
- SEC. 172. Lease may be good in part, and bad in part.
- SEC. 173. Lease under power, requiring the best rent.
- SEC. 174. Leases by trustees of charities.
- SEC. 175. Grounds on which equity intervenes.
- SEC. 176. How rental value is to be ascertained.

SEC. 165. Generally.—A trustee of lands, being the owner of the legal interest,¹ may grant leases at law which cannot be impeached in equity, so long as they are justified by the quantity of his estate. But a person taking a lease from a trustee with notice of the trust, and without the concurrence of the *cestui que trust*, is subject to the control of a Court of Equity.²

¹ Upham v. Varney, 15 N. H. 426; Fay v. Taft, 12 Cush. (Mass.) 448; Pearce v. Savage, 45 Me. 90; Gill v. Logan, 11 B. Mon. (Ky.) 281. Where an estate is devised to a trustee, in fee, "for the sole use, benefit, and behoof" of a married woman for life, and after her death "for the sole use, benefit, and behoof" of a person or class of persons, who are in *esse*, and are *sui juris*, the legal estate in fee given to the trustee is cut down to an estate commensurate with the separate estate for life of the married woman (an estate *per autre*

vie), which it is his duty to preserve; and the statute forthwith executes the use as to the residue in the remainder-men, concerning whose interest the trustee had no special duty to perform. So where the legal estate given to the trustee has not amplitude sufficient to enable him to perform the duties of his trust, his legal estate will be enlarged by implication to an extent commensurate with the objects and duties of the trust. *William v. Holmes*, 4 Rich. (S. C.) Eq. 475.

² 1 Platt on Leases, 345.

But where the trust is to sell, the granting of a lease, or of an under-lease of a term, is *prima facie* inconsistent with the trust. There may be circumstances, however, that would justify such action, as, if, after making reasonable efforts, a purchaser at a reasonable price could not be found, or if there exists such financial depression as renders it impossible to obtain the fair value of the property, the trustee would doubtless be justified in departing from the trust.¹

SEC. 166. Powers of cestui que trust.—The *cestui que* trust, having only an equitable estate, cannot, without the concurrence of the trustee, convey a legal interest; but he can give a good title in equity, and his demise may be operative by way of estoppel; but such a tenancy is precarious, and, as against the trustee, the tenant is a mere trespasser,² and liable to be evicted by the trustee without previous notice to quit.³ In order to fully protect the lessee, the trustee and *cestui que* trust should join in the lease. The trustee should “demise and lease,” and the *cestui que* trust should insert not only words of demise, but also of consent and approbation.⁴ If there are several *cestuis que* trust, of course the assent of *all* should be obtained, as none will be bound, except those who concur, and the lessee, from the circumstance of the recital, is bound to make further inquiry, and thereby being treated as having notice of the title of the other *cestuis que* trust, cannot hold in opposition to them.⁵ The rule is, that, *if a man has before him that which ought to put him on fair inquiry, and he does not inquire, the knowledge of all that he might have learned by such inquiry is imputed to him.*⁶ In order that the covenants in such a lease should run with the land, they should be entered into with the trustee,⁷ but the rent

¹ Evans v. Jackson, 8 Sim. 217. See also, Jervaise v. Clark, 5 Madd. 96, where leases of mines upon lands given in trust for sale, were upheld, it being understood that the trustee proposed to sell the leases.

² Clake v. Foster, 8 T. R. 487.

³ 1 Platt on Leases, 123.

⁴ Ibid. 124.

⁵ Platt on Leases, 124; Mulpas v. Ackland, 3 Russ. 273.

⁶ MR. SUGDEN in his argument in Mulpas v. Ackland, 3 Russ. 273, and adopted by the Master of the Rolls in that case.

⁷ Webb v. Russell, 3 T. R. 398. The covenants should run to one

should be reserved generally, without specifying to whom, leaving it to the law to make the proper application.¹

SEC. 167. **For what term trustees may lease.**—The trustee may lease the premises for a *reasonable* term, and as to what is reasonable is to be determined in view of the nature, character and purpose of the trust, and is therefore a question that must necessarily depend upon the peculiar circumstances of each case. Thus, where a testator devised lands to trustees upon trust, to pay out of the rents and profits certain annuities, and subject thereto to permit A, and after him his wife, to take the rents and profits during their respective lives, the lands, after their decease, to go to their children, it was held that a lease made by the trustee for the term of ten years was reasonable and valid.² In a New York case, a lease made by trustees for twenty-one years, was upheld; however, the burden of establishing the reasonableness of the term devolves on the trustee and the lessee holding under him.³ Trustees to whom a discretionary power is given of renewing leases, have not an arbitrary power of renewal, but must renew when most for the benefit of the *cestui que* trust.⁴

who holds the legal estate, *Stokes v. Russell*, 8 id. 678; *Russell v. Stokes*, 3 H. Bl. 562.

¹ 1 Platt on Leases, 124; *Whitlock's Case*, 8 Coke, 69 b., 71 a.

² *Greason v. Keteltas*, 17 N. Y. 491; *Naylor v. Arnitt*, 1 Russ. & My. 501. See also *Attorney-General v. Owen*, 10 Ves. Jr. 555, where LORD ELDON held that, while a trustee might do what is reasonable, he certainly could not alienate the term for ninety-nine years.

³ In that case it was held, that a trustee holding a legal fee, determinable when the trust shall cease, has power at law to lease for a term which may extend beyond the period of his trust-estate, subject to the jurisdiction of a court of equity to annul the lease if unreasonable or improvident. Thus, trustees having a fee determinable upon the death of testator's chil-

dren, have power to lease for a term of years, with a covenant to renew or pay for buildings to be erected by the lessee. *Greason v. Keteltas*, 17 N. Y. 491. To the same effect is a previous decision in S. C., 19 Barb. 608.

⁴ *Attorney-General v. Owen*, 10 Ves. 555.

⁵ *Milsinton v. Mulgrave*, 3 Madd. 491. Where a manor is conveyed to trustees, upon trust, to divide the profits of it amongst the tenants of the manor, it is the duty of trustees not to let the right of sporting to any of the tenants, upon terms advantageous to them as tenants, but to make the best profit they can, by letting the right of sporting to all eligible persons, whether tenants or otherwise, and to divide the profit so made, ratably amongst the *cestui que* trusts. *Hutchinson v. Morritt*, 8 Yon. & C. 547. For in-

SEC. 168. **Confirmation of imperfect lease by cestui que trust.**—Where a *cestui que* trust receives the rents from a tenant under a lease executed by a trustee in excess of his authority as such, he will, in equity, be bound thereby; but the acceptance of rent, even for a long period (in the case cited, for nine years), the *cestui que* trust will not be precluded from obtaining equitable relief against the lease, if he was ignorant of the fact that the trustee had imperfectly exercised his power.¹ The rule seems to be that the *cestui que* trust may confirm, by his acquiescence therein, any act of the trustee which would have been valid if it had originally been concurred in by the *cestui que* trust.²

SEC. 169. **Trustee not liable for loss, when.**—A trustee letting premises originally at a proper rent, will not be held personally liable for the difference between that rent and the rent which, at a subsequent period of the tenancy, might have been obtained, merely because he neglected to give notice to quit a few months after there appeared to be a probability that the price of an agricultural produce would enable him with propriety, as between landlord and tenant, to obtain a higher rent. And this rule would be applicable even to a case in which the tenant was a near relation of the trustee, unless there were some other circumstances to confirm the suspicion of personal favor which that relationship is calculated to excite.³

SEC. 170. **Trustee cannot be compelled to specifically perform contracts of his grantor, when.**—A trustee cannot be compelled to specifically perform any contract entered into by his grantor; where he has no beneficial interest in the estate, he will be required to enter into covenants against other than his own acts. Thus, a copyholder

stances in which the question of the reasonableness of terms has been discussed and decided, see *Attorney-General v. Griffith*, 13 Ves. 575; *Attorney-General v. Hatham*, 1 T. & R. 209; *Attorney-General v. Warren*, 6 Beav. 288.

¹ *Barnes v. East London Waterworks Co.*, 3 Madd. 375.

² *Munch v. Cockerell*, 5 Myl. & Cr. 178.

³ *Ferraby v. Hobson*, 2 Ph. 255.

agreed to demise a tenement within the manor for sixty-three years, on a building lease, and, as the custom did not allow a lease to be made for more than twenty-one years, the copyholder agreed to execute a lease for twenty-one years, with a covenant, for himself, his heirs and assigns, to renew the lease for a further term of twenty-one years at the expiration of the first, and for a further term of twenty-one years at the expiration of the second term. The copyholder died before the lease was executed, having devised the premises to a trustee. It was held, on a bill by the lessee against the trustee for specific performance, that the trustee, having no beneficial interest in the estate, was not bound in the lease for twenty-one years to enter into any covenant for the renewal of the lease at the expiration of that term, and that he could be required to covenant only against his own acts.¹

SEC. 171. Cannot subject property to his own debts.—A trustee cannot, by permitting the property of his *cestuis que* trust to be hired out by another, divert the title of the donees, or subject the property to the payment of his own debts or those of a third party, especially when the donees are infants.² But he may bind the estate under a building lease, either to renew the lease according to a covenant to that effect, or to pay for the erections made upon the estate.³

SEC. 172. Lease may be good in part, and bad in part.—A trustee, empowered to lease for twenty-one years, must have a right to the possession, and if there is a valid outstanding term at the time a new lease is made “for twenty-one years from date,” inasmuch as the lessee cannot enter until after the previous term has expired, the lease is void because it is the grant of a reversion, and equity has no power to aid the defective execution, and render it a valid lease for twenty-one years from the expiration of the outstanding term. But if the lease is valid, the

¹ *Worley v. Frampton*, 5 Hare, 560; *Evans v. Jackson*, 8 Sim. 217. ³ *Robinson v. Kettletas*, 4 Edw. Ch. (N. Y.) 67.
² *Easley v. Dye*, 14 Ala. 158.

fact that it contains a covenant for a renewal for two terms of twenty-one years each, where the power gives only the right to make the lease for one term of twenty-one years, will not invalidate it, but equity will sustain it as a lease for twenty-one years, and cut off the right to renew.¹

SEC. 173. *Lease under power, requiring the best rent.*—A power given to a trustee to lease for the best improved rent is void, if it is shown that reasonable diligence would have secured a much larger *at the time the lease was made*. Such a power requires that the trustee should not only exercise good faith, but reasonable diligence, and whether he used such diligence or not, will depend upon the circumstances of each case;² and generally where the rent reserved is so grossly inadequate as to evince a lack of good faith, and want of the exercise of reasonable judgment and discretion on the part of the trustee, a court of equity will set it aside;³ but mere inadequacy is not enough of itself, unless so grossly inadequate as to put the lessee on inquiry as to the fairness of the transaction, or raise a presumption of fraud.⁴

SEC. 174. *Leases by trustees of charities.*—Leases made by trustees of charities, except where they are specially regulated by statute, are under the immediate supervision of the Courts of Chancery, as paramount trustee,⁵ which exercise the utmost vigilance to prevent any unfairness or fraud, as well as to restrain any essential deviation from the intention of the founder of the charity. and,

¹Griffen v. Ford, 1 Bos. (N. Y.) 123.

²Ibid.

³Hinterv. Stirgel, 1 Md. Ch. 288; Johnson v. Dorsey, 7 Gill (Md.) 269.

⁴Booker v. Anderson, 35 Ill. 66; Singleton v. Scott, 11 Iowa. 589; Busnett v. Higgins, 2 W. Va. 485.

⁵3 Blackstone's Com. 427; Attorney-General v. Talbot, cited 13 Ves. Jr. 580, and this supervisory power exists in the Court of Chancery by virtue of its original jurisdiction, and is in no measure dependent upon the 43 Eliz. 64; Wil-

liams v. Pearson, 38 Ala. 291; McCord v. Ochiltree, 8 Blackf. (Ind.) 15; Beall v. Fox, 4 Ga. 404; Tappan v. Deblois, 45 Me. 132; Dutch Church v. Mott, 7 Paige Ch. (N. Y.) 77; Burr v. Smith, 7 Vt. 141. Attorney-General v. Jolly, 1 Rich. (S. C.) 99; Perrin v. Corey, 24 Dew. (U. S.) 465; Going v. Emery, 16 Pick. (Mass.) 107; Whitman v. Sex, 17 S. & R. (Penn.) 88. The statute of Eliz. 43, is not in force in Maryland or Virginia. It was repealed in the latter State in 1792.

unless beneficial to the interests of the charity, they will be set aside, irrespective of the length of time which they have existed.¹ LORD ELDON was of the opinion that trustees of charities were not bound to look with more providence to the affairs of the charity than their own ;² but this does not seem to be the accepted doctrine, and in several later cases it has been held that the fact that a trustee has acted with reference to the affairs of a charity, with the same prudence that he would have acted in his own business, is not sufficient, but that he must be able to satisfy the court *that he has acted fairly and prudently, and for the benefit of the cestui que trust.*³

SEC. 175. Grounds on which equity intervenes.—The court always rests its intervention in such cases upon the assumption that the lessor has been guilty of a breach of trust, and that the lessee was accessory thereto by accepting such a lease,⁴ and this is especially the case where the lease is made for a long term at a stationary rent.⁵

¹ 4 Jaurm. Byth, 259 (3d Edn.); Attorney-General v. Hatham, 3 Russ. 415; Attorney-General v. Owen, 10 Ves. Jr. 555; Attorney-General v. Brooke, 18 id. 320; Attorney-General v. Hungerford, 3 Bligh. N. & C. 437.

² Attorney-General v. Dixie, 13 Ves. Jr. 519.

³ Attorney-General v. So. Sea Co., 4 Beav. 453. In Attorney-General v. Kerr, 2 id. 420, LORD LANGDALE, Master of the Rolls, said: "As to granting leases of a charity property, it is certainly a strong proposition to lay down, that the trustees of a charity have the same powers which a prudent owner has with respect to his own property; there may perhaps be *dicta* which go almost to that extent, but I apprehend that much more is expected from trustees acting for a paramount charity, than can be expected from the ordinary prudence of a man in dealing between himself and other persons. A man acting for himself may indulge his own caprices, and consider what is convenient or agreeable to himself, as well as what is strictly prudent, and his prudential motives cannot

afterwards be separated from the others which may have governed him. Trustees of a charity, within the limits of their authority, whatever they may be, should be guided only by a desire to promote the lasting interests of the charity." See opinion of LORD BROUGHAM in Attorney-General v. Mayor, &c., of Newbury, 3 My. & R. 647.

⁴ Atty.-General v. Cross, 3 Meriv. 539; Atty.-Genl. v. Moses, 2 Madd. 208.

⁵ Atty.-Genl. v. Cross, ante; Atty.-Genl. v. Brooke, 18 Ves. 326. An husbandry lease for ninety-nine years at a uniform rent. Atty.-Genl. v. Owen, 10 Ves. 555; Atty.-Genl. v. East India Co., 11 Sim. 360; Atty.-Genl. v. Morgan, 2 Russ. 306; Atty.-Genl. v. Cashel, 2 D. & W. 294; Atty.-Genl. v. Lord Hotham, 1 T. & R. 209; affd. 3 Russ. 415, or for seventy years, at a stationary rent, Atty.-Genl. v. Griffith, 13 Ves. 575; Atty.-Genl. v. Foord, 6 Beav. 288; Atty.-Genl. v. Backhouse, 17 Ves. 290; Atty.-Genl. v. Warren, 2 Swanst. 304, will be set aside as improvident, unless they are shown to be beneficial to the surety. "It is too

But if the lease is beneficial to the charity, the fact that it is for a long term is not regarded as a sufficient ground for setting it aside. Thus, in one case, a building lease for six hundred years was upheld, it being made to appear that the lease was beneficial to the charity.¹ The same principles apply to the renewal of such leases, under a covenant to renew, contained in the lease. Whatever may formerly have been the rule,² it is now certain that a renewal will not be decreed, unless it is shown to be beneficial to the charity,³ or, unless the lessee has made extensive improvements upon the lands, and the renewal will afford him no more than a just compensation for the outlay.⁴ It is not, however, an inflexible rule, that the courts will not uphold leases by trustees of a charity for a long term, as circumstances *may* exist which will justify such leases, or even an absolute alienation of the property.⁵ Thus, in the case last cited, the court upheld a lease for nine hundred and ninety-nine years, at a fixed rent, because the transaction was fair, and the rent reserved adequate for the term. In an Irish case,⁶ which was afterwards affirmed in the House of Lords, the court refused to set aside a lease made by the trustees of a charity, with covenants for perpetual renewal, because it appeared to be a beneficial disposition of the property. But it may be stated as a general rule, that leases of property belonging to a charity will in all cases be set aside, unless they are shown to be provident and beneficial, and the burden of establishing their beneficial character is upon the lessee and trustees who seek to uphold it.⁷ If, however the lease, at the

clear," says SIR THOMAS PLUMOR, M. R., in *Atty.-Genl. v. Hotham*, ante, "to admit of any doubt, that a husbandry lease of lands belonging to a charity, for ninety years at an uniform rent, cannot stand, unless some satisfactory reason is given to support it."

¹ In *ReCross*, 27 Beav. 592.

² See *Atty.-Genl. v. Smith*, 2 Vern. 716, in which a decree for a perpetual renewal of a lease was made.

³ *Watson v. Hunsworth Hospi-*

tal, 14 Ves. Jr. 333; *Atty.-Genl. v. Warren*, 2 Swanst. 303; *Atty.-Genl. v. Brooke*, 18 Ves. Jr. 326.

⁴ *Atty.-Genl. v. Baliol College*, 9 Mod. 407.

⁵ *Atty.-Genl. v. So. Sea Co.*, 4 Beav. 253.

⁶ *Atty.-Genl. v. Hungerford*, 2 Cl & F. 357.

⁷ *Atty.-Gen. v. So Sea Co.*, ante; *Atty.-Genl. v. Griffin*, 13 Ves. Jr. 575; *Atty.-Genl. v. Owen*, 10 id. 560; *Atty.-Genl. v. Kerr*. 2 Beav. 297.

time when it was made, was fair and free from all suspicion of collusion or fraud, it will not be set aside, because by adventitious circumstances its rental nature has been largely increased.¹ But if the founder of the charity prescribes a definite term as the utmost limits of leases to be made by his trustees, they cannot exceed such limits either directly or indirectly,² and a court of equity has no power to order a lease to be made for a longer term,³ although in the case last referred to, the court granted such an order; but Vice-Chancellor SIR ANTHONY HART said: "But, I would not take such a lease under the order of this, or any other court of equity. There must be an Act of Parliament to render legal such deviation from the founder's intention."⁴ Courts of equity will set aside leases by trustees of a charity, when the rent reserved is satisfactorily shown to be so *considerably* below the actual rental value as to evince unfairness on the part of the lessee.⁵

¹ In *Atty.-Genl. v. Pembroke*, 2 Sim. & Stu. 441; *affd.* 1 Russ. & My. 751, SIR JOHN LEACH, V. C., said: "I cannot think it the office of a court of equity, at the distance of more than two centuries, to undo an arrangement which was perfectly fair at the time between the contracting parties, and was sanctioned with the full approbation of the executor of the founder, and has become unequal only from accidents arising out of the course of time."

² *Watson v. Hunsworth Hospital*, 14 Ves. Jr., 324; *Atty.-Genl. v. Griffith*, 18 id. 565; *Taylor v. Dulwich Hospital*, 1 P. Wms. 655.

³ *Atty.-Genl. v. Rochester*, 2 Sims. 34.

⁴ But see *Birkhamstead Free School*, *Ex parte*, 2 V. & B. 138.

⁵ See *Atty.-Genl. v. Wilson*, 18 Ves. Jr. 518; *Reresby v. Farrer*, 2 Vern. 414; *East v. Ryall*, 2 P. Wms. 284; *Atty.-Genl. v. Gore*, 9 Mad. 224. Where the court assumed to control a power conferred by the founder of the charity, when it was shown not to be the best to act upon it, *Atty.-Genl. v. Cross*, 3 Meriv. 541; *Atty.-Genl. v. Hungerford*, 2 Cl. & F. 357. It does not follow that a ten-

ant who has got a lease of charity estate at too low a rent with reference to the actual value, is of necessity to be turned out, if it appear that he himself has acted fairly and honestly. *Ex parte Skinner*; in the matter of *Lawford Charity*, 2 Meriv. 453-457; S. C. 1 Wils. Ch. Ca. 14; *Attorney-General v. Hungerford*, 2 Cl. & F. 357. The only ground for so dealing with him would be some evidence or presumption of collusion or corruption of motive. The circumstance of the tenant being a relation of the trustee, furnishes a ground of suspicion. *Ex parte Skinner*, 2 Meriv. 457. But if the trustee, or one of the governors of the charity, be himself the tenant, though nothing wrong in a moral point of view can be imputable to him, or the other governors, yet, according to the general rule adopted in equity for the purpose of guarding against possible fraud, the court will not allow him to remain lessee of the lands, which, as trustee or governor, it was his duty to let at the greatest possible advantage. *Attorney-General v. Dixie*, 13 Ves. 519, 531, 534; *Attorney-General v. Earl of Clarendon*, 17 Ves. 500. It ought, however, to be

SEC. 176. How rental value is to be ascertained.—But, in ascertaining the real rental value, regard is to be had to

remembered, that the case of a charity estate is one in which, of all others, the security of the rent is the first object to be regarded; and, therefore, in such cases, the inadequacy of the rent is less a badge of fraud than it would be in almost any other instance. *Ex parte Skinner*, ante. The discovery of the fact of undervalue, depending, as it necessarily must, on numerous relative circumstances, and involved in obscurity in proportion to the remoteness of the transaction, is occasionally surrounded by difficulties of the most perplexing character. From the conflicting nature of the evidence adduced, it is sometimes next to impossible to elicit any *data*, or establish any position, as a safe or satisfactory guide to the judgment. Surveyors very seldom concur in opinion. *Attorney-General v. Owen*, 10 Ves. 560. In one case (*Attorney-General v. Magwood*, 18 Ves. 317); for instance, a messuage was estimated by different witnesses to be of the annual value of 55*l.*, 50*l.*, and 30*l.* But in one of later decision (*Attorney-General v. Cross*, 3 Meriv. 535, the difference was rather more startling. Witnesses were examined on both sides, and a good deal of contradictory evidence produced, as to the value of the estate at the respective times of granting certain leases in 1772, 1801, and 1814, and filing the original information, and the proportion of the several fines paid and of the rent reserved to such annual value. The same, according to the witnesses for the plaintiff, was made to amount in 1772 to 80*l.*, in 1801 to 180*l.*, and in 1814 to 280*l.*, exclusive of outgoings; while the witnesses for the defendants differed in their opinions as to value, making it from 40*l.* to 65*l.* at the first, from 100*l.* to 150*l.* at the second, and from 100*l.* to 180*l.* at the third, of the above periods. These examples furnish additional and painful proof, if additional proof be wanting, of the uncertainty and insecurity of human testimony. When, however, these differences occur, the testimony of witnesses who have never

had occasion to survey the premises with a view to a correct estimate of their value, but who, upon a loose recollection of the several circumstances that entered into their computation at a distant period, offer opinions as to their value at that period, cannot be put into any degree of competition with the evidence of persons who made a survey for that express purpose at the granting of the lease, particularly where neither the skill nor integrity of the surveyor can be impeached, nor improper motives for undervaluing the land imputed to him. *Attorney-General v. Cross*, 3 Meriv. 542. These considerations suggest the policy of having the estate valued by a surveyor of skill and reputation previously to a lease being granted. In administering relief, the mode may differ with the peculiarities of the case, but where the lease has been granted for an unreasonable term, the court usually decrees its cancellation. *Yervel Poor v. Sutton*, *Duke's Charit. Uses*, 43, *Bridgm. edit.* 628; *Attorney-General v. Green*, 6 Ves. 452; *Attorney-General v. Owen*, 10 Ves. 555; *Attorney-General v. Griffith*, 13 Ves. 565; *Attorney-General v. Hotham*, 1 *Turn. & Russ.* 209; affirmed on appeal, 3 *Russ.* 415. If inadequate consideration form a ground of complaint, the payment of an additional rent, generally computed from the filing of the information, or previous demand by the releasors, *Attorney-General v. Green*, ante; *Attorney-General v. Owen*, ante; *Attorney-General v. Griffith*, ante; is decreed against the lessee. *Id.*; *Yervel Poor v. Sutton*, Sup; *Eltham Parish v. Warreyn*, *Duke's Charit. Uses*, 67, 641; *Wright v. Newport Pond School*, *Duke's Charit. Uses*, 46, 649; *Reresby v. Farrer*, 2 *Vern.* 414; 1 *Eq. Ca. Ab.* 100, pl. 7; *Smith v. Stowel*, 1 *Ch. Ca.* 195. But, as equity cannot relieve without being acquainted with the terms of the original contract, in cases of uncertainty, where, for example, the surrender of a former lease formed part of the consideration, an inquiry will be directed to ascertain wheth-

the condition of the property and its rental value *when the lease was made*, and the fact that the lessee subsequently underlet the property for a much greater rental, does not afford conclusive evidence that the rental was undervalued, because the increase may be due to the goodwill established by the lessee, or to improvements made by him, and these matters are always to be considered,¹

er the lease were reasonable at first, regard being had to the rent reserved, the money expended in building, or otherwise, and the duration of the term. Attorney-General v. Backhouse, 17 Ves. 283; Attorney-General v. Magwood, 18 Ves. 815. A specific prayer for an account of the rent is not requisite. The rule in cases of charity is almost universal, that the general prayer is sufficient; and the relief will be adapted to the case (Attorney-General v. Brooke, 18 Ves. 819), even although the information prays wrong relief. Attorney-General v. Whiteley, 11 Ves. 247. The court does not permit its feelings upon the abuse of a charity estate to carry it beyond what is just, even against those who are guilty, much less against innocent parties, (Attorney-General v. Backhouse, 17 Ves. 292. And see Attorney-General v. Griffith, 18 Ves. 579); therefore, if the lease be valid at law, equity will not set it aside without allowing for lasting (Attorney-General v. Baliol College, 9 Mod. 407, 411; S. C. Duke's Charit. Uses, 268; Attorney-General v. Kerr, 2 Beav. 420. But see Attorney-General v. Griffith, 18 Ves. 580), though not for merely ornamental (Attorney-General v. Kerr, 2 Beav. 420) improvements. And it would appear, that, if, under a covenant to build, buildings be erected, not *eiusdem generis*, but equally beneficial to the charity as if they had been made pursuant to the stipulation, the court would be unwilling to hold that the charity, after a great lapse of time, should have both the buildings and the price due, upon the principle of waste, by the failure to perform the covenants. Attorney-General v. Backhouse, 17 Ves. 292. So, the enjoyment of an under-lessee is seldom disturbed. *Id.*; Attorney-Gen-

eral v. Griffith, 18 Ves. 565; Attorney-General v. Foord, 6 Beav. 288. The court, feeling the extreme hardship upon those who have given a full consideration, usually mitigates the decree with regard to their interests, by merely directing them to pay the rent to other persons than those to whom they had contracted to pay it; for, as the interests of those persons may be very fair as between them and those from whom they take, the relief is adapted to the conduct of the parties, as the court finds them respectively to have acted fairly or not towards the trust, Attorney-General v. Backhouse, 18 Ves. 292. The same indulgence is extended to a party purchasing the under-lessee's interest; for though the purchaser of a lease has never been considered as a purchaser for valuable consideration without notice, to the extent of not being bound to know from whom the lessor derived his title, yet no case has gone the length of saying that he is to take notice of all the circumstances under which the lessor derived that title. The purchaser of the underlease must be understood at least to have notice that the lessors were trustees for a charity; *but not that the lease was bad*; that depending upon a variety of circumstances *dehors* the lease. Atty.-Genl. v. Backhouse, 17 Ves. Jr. 283; Atty.-Genl. v. Pargeter, 6 Beav. 150. In setting aside a lease improperly granted, the court will not permit the personal covenants of the trustee for quiet enjoyment to remain in force, but will annul the transaction *in toto*. Atty.-Genl. v. Morgan, 3 Russ. 306; 1 Platt on Leases, pp. 359-362.

¹ Atty.-Genl. v. Magwood, 18 Ves. 315.

and even though the rent is too small, yet, if the lessee has acted fairly and honestly, the lease ought not to be disturbed.¹

¹ *Ex parte Skinner*, 2 Meriv. 453; *Atty.-Genl. v. Hungerford*, 2 Cl. & F. 357.

CHAPTER XXIII.

BY DISSEIZOR OR DISSEIZEE.

SEC. 177. Leases by disseizor.

SEC. 178. By disseizee.

SEC. 177. *Leases by disseizor.*—A person in possession of lands, may grant a lease thereof, that will be valid as against him and all others not having a better title, and this is so, although his possession is tortious, and he is a mere disseizor ;¹ and if he subsequently becomes entitled to the lands; by conveyance from the rightful owner, he is estopped from denying the validity of the lease, if the tenant was, at the time of the purchase, in possession under it. His after-acquired title does not affect the tenant, except to make his rights, under the tenancy, more secure.² But the rule is otherwise, if it appears by the recitals in the lease, that the lessor has no title, and, consequently, nothing to demise : and in such a case a subsequent purchase of the premise by the lessor, would

¹ Lee v. Norris, Cro. Eliz. 331; Thurston's Case, Ow. 66; Webb v. Austin, 8 Scott, N. R. 419.

² Cooke v. Brogan, 5 Ark. 693; Jackson v. Murray, 12 John. (N. Y.) 201; Leicester v. Rehoboth, 4 Mass. 180; Sinclair v. Jackson, 8 Cow. (N. Y.) 548; Trevivan v. Lawrence, 6 Mod. 258; Faulkner v. Morse, 3 T. R. 371; the subsequent acquisition of title by the lessor feeds the estoppel, Christmas v. Oliver, 5 M. & R. 202; 2 Smith's L. C. 418. PARKE, B., in Sturgeon v. Wingfields, 15 M. & W. 230. In Rawlins' Case, 4 Coke, 53 b., one Cartwright made a lease to Warlow, for six years, by indenture, of a house, in which he had no title,

and afterwards he purchased a lease of Rawlins of the same house for twenty-one years; then Cartwright redemised to Rawlins for ten years. The court held: 1st. That the lease by Cartwright to Warlow was good for six years against Cartwright by conclusion, but nothing in interest. 2d. That as soon as Cartwright had purchased his interest for twenty-one years, Warlow's interest for six years *became a lease in interest*, the reversion in Cartwright. 3d. That when Rawlins took a redemise from Cartwright, for ten years, he was bound by the estoppel, and took only a future interest, there being no attornment.

not feed the estoppel,¹ the rule being, that a party is not estopped by a deed or other conveyance executed by him, if the whole truth of the case appears in the recitals.² Of course, a lease from a mere trespasser or disseizor has no validity against the real owner, and he may be ejected by the latter, without previous notice to quit,³ unless the disseizee has in some manner ratified or confirmed the lease, as he may do, it being merely voidable.⁴ If the lease is for life, a confirmation of the land by the disseizee confirms the whole;⁵ but if it is for a term of years, he may apportion his confirmation: as, where the disseizor's tenant has underlet, he may ratify the one lease, and not the other, or may confirm the whole or part of the land for any number of years.⁶ If the lessee of the disseizor is evicted by the disseizee, he is thereby released from all liability upon his covenants to the disseizor; but, until he is evicted, he is bound by his covenants, and must perform them,⁷ as he cannot deny the title of his landlord, where no fraud was used, and, therefore, must pay the rent, and perform all the covenants he has taken upon himself under the lease.

SEC. 178. By disseizee.—Possession in law, or in fact, is

¹ Dew v. Camp, 19 N. J. L. 148;
Warren v. Leland, 2 Barb. (N. Y.)
613.

² Hermitage v. Tomkins, 1 Ld.
Rayd. 729. In Lockard v. Bar-
ton, 78 Ala. 189, it was held that a
person who receives the rents of
lands, while in possession under
claim of title adverse to the plain-
tiff, is not liable to the plaintiff in
an action for money had and re-
ceived, although a suit in equity
was pending at the time to hold
him liable as trustee of the lands
for the benefit of the plaintiff.

³ Thurston's Case, Ow. 16; Vi-
ner's Abr. tit. Estates. (R. a, 5) pl.
8; 2 Vent. 68.

⁴ Bacon's Abr. tit. Leases, (H.)
5; Bedford v. Ford, Cro. Eliz. 447.
In Foord's Case, 5 Coke, 81 a, the
court held, that where a disseizor
makes a lease, its confirmation by
the disseizee for one hour confirms
the whole estate.

⁵ Foord's Case, 5 Coke, 82 a.

⁶ Foord's Case, ante, S. C.; also

in 3 Dyer, 883 b.; Cro. Eliz. 447; 1
And. 47. In Dyer, the court is rep-
resented as not having been unani-
mous, JEFFREY, J., being of the
opinion that the confirmation was
void for the whole, and judgment
is represented as having been ren-
dered without argument for the 51
years; but COKE says, and CROKE
and ANDERSON both agree with him
in this respect, that the confir-
mation was held to be good for the
whole time. In 4 Bacon's Abr. tit.
Leases, (H.) 4, the author says: "If
a disseizor makes a lease for years,
or grants a rent charge, and the
disseizee confirms it, and after, re-
enters, yet he shall not avoid the
lease or rent, because, by his con-
firmation of them, he hath depart-
ed with so much of his ancient
rights, which incorporates or mixes
with the lease or grant, so that he
can never after avoid them.

⁷ Andrews v. Needham, Cro.
Eliz. 656.

indispensable, both by the statutes existing in most, if not in all, the States, and by the common law, in order to create a lease to operate *in presenti*,¹ and if the premises are in the *adverse* possession of another, a lease made *and delivered* while they are so adversely held, will be absolutely void.² But where there is no adverse holding, the possession will follow the title, and be deemed to be in him who has the title;³ consequently, in all cases where there is no adverse occupancy, the owner of the land has such a constructive occupancy as will give validity to a lease made by him. Therefore, a lease made of premises, to take effect when another lease outstanding terminates, is valid, because the possession of the tenant is the possession of the landlord and enures to his benefit, and cannot be adverse.⁴ A disseizee can make a valid

¹ Co. Litt. 46 b, 352 a; Parsley v. Day, 2 Q. B. 147; the lessor must either have possession or an *interesse termini*. Sheppard's Touchstone, 269.

² Isham v. Morrice, Cro. Car. 109; at common law, an actual or constructive possession of land is an indispensable requisite to the transmission of any right or interest therein. Jackson v. Huntington, 5 Pet. (U. S.) 402. And the rule is the same, whether such adverse possession has existed for a long, or for only a brief period, or even whether the lessor knew of such adverse occupancy. Sohler v. Coffin, 101 Mass. 179. If an actual adverse possession existed, it will defeat the conveyance of any interest therein by the owner, until he reinvests himself with the possession, either by action, or by forcibly turning the disseizor out of possession. In order to constitute an adverse possession there must be a possession under a claim of right, adverse to the true owner. Baker v. Swan, 33 Md. 355. And unless the occupancy is under a color of title it must be actual, as there can be no constructive possession without it. Wells v. Jackson Mfg. Co., 48 N. H. 491; Sepulveda v. Sepulveda, 39 Cal. 13. But if a lease is made to, and accepted by, the disseizor, it is good, because by such accepted the disseizin ends, and the

relation of landlord and tenant arises; and so long as this lease is outstanding, or as he recognizes the lessor's title, no adverse possession exists. Abbey, &c., Assn. v. Welland, 48 Cal. 614.

³ Halley v. Hawley, 39 Vr. 525; Fasgate v. Mfg. Co., 12 N. Y. 580, and the burden of establishing an adverse occupancy, is upon him who seeks to avail himself of it, as the presumption that the owner is in possession must be overcome by proof. Washburn v. Cutter, 17 Minn. 361; Lamb v. Burbank, 1 Sawyer, (U. S. C. C.) 227.

⁴ Corning v. Troy Iron Factory, 34 Barb. (N. Y.) 485; Sharp v. Kellogg, 5 Den. (N. Y.) 431; Bellingham v. Alsop, Cro. Jac. 52, 408; Grant v. Townsend, 2 Hill (N. Y.), 554; Sassyn v. Adams, Cro. Jac. 66 Roll. 1242; Burton v. Brown, Cro. Jac. 648; Fish v. Bellany, Cro. Jac. 71. A reversionary lease, which may be defined to be a lease to commence on a future day, or event, Winter v. Loveday, 2 Salk. 587; Clarges v. Funucan, 2 Doug. 565, operating in the mean time as an *interesse termini*; Smith v. Day, 3 M. & W. 684, may be granted at common law, with or without deed, even by a person who has merely a reversion or remainder; but when granted without deed, it confers no right to the possession

lease, only while actually disseized, by delivering it in escrow, to be delivered after entry and actual possession of the lands demised, in his name. "Or," says BACON¹ after signing and sealing before actual delivery, he may make a letter of attorney to a third person, to enter upon the land in his name, and after such entry to deliver it upon the land, or elsewhere, as his deed, to the lessee; and though such letter of attorney be affixed to the deed (and to make it an effectual letter of attorney, it must be sealed and delivered), yet the sealing and delivery of that by the lessor, though affixed to the deed of lease, will not be construed a delivery of the lease itself, because no such intent appears, but the contrary; and, therefore, the delivery of the letter of attorney shall have no more influence upon the deed of lease than if it had not been affixed thereto: as such disseizee may prepare a deed of lease, and at the same time execute a letter of attorney to a third person, to enter upon the land, and after such entry to sign, seal, and deliver the lease as his act and deed to the lessee: and all these ways are good, because the delivery is the essential and finishing part of a deed; and if the possession and seizin be reduced before that comes, the delivery after is as effectual as if the whole deed had been prepared and executed after; because, till the delivery, the deed took no effect, and when the delivery was, he was in actual possession, and consequently might make such lease.² But if such disseizee being out

until the possession is vacant, nor to the rents accruing in the interim; on a reversionary lease, however, as well as leases of the reversion, the lessor may reserve rent *immediately*; because there is a valid contract, upon which the lessee is bound, and upon which an action of debt will lie against him; and when the lessee comes into possession, the lessor may proceed against him by distress for the arrears. 2 Roll's Abr. 406-7, 1 Just. 47 a, 411 (G.) Plowd. 423. But such leases do not disentitle the lessor to proceed against the first lessee by action or distress, for the rent. Smith v. Day, ante;

Rawlings v. Walker, 5 B. & C. 111. A reversionary lease takes effect immediately upon the determination of the first lease. Hinchcliffe v. Kinnval, 5 Bing. N. C. 1. By giving a lease to commence at a future day, the tenant acquires a right to enter when the day arrives. Wall v. Granger, 8 N. Y. 115.

¹ 4 Bacon's Abr. tit. Leases, (H.) 4.

² Co. Litt. 48 b; Sharp v. Sharp, Cro. Eliz. 483; Stephens v. Elliot, id. 484; Jemmings v. Bragg, id. 446; Davis v. Bridges, 2 Roll's Abr. 25.

of possession, had sealed and delivered the deed of lease as his deed, though he had after actually entered upon the land, and then delivered the lease again as his deed, yet, no interest would pass to the lessee by either of these deliveries, for, as his deed, it took absolute effect by the first delivery, and then the second delivery, to make it his deed, was void, and to no purpose,¹ for a deed cannot have two deliveries,² for, if the first delivery took effect, the second is void,³ and the first delivery to make it a lease was void, *because he was then out of possession*, and had only a right of entry, which he could not transfer to a stranger; and, therefore, the lease is absolutely void to carry any interest to the lessee. And so it would be, if after such delivery of it as his deed, he had made a letter of attorney to enter and deliver it as his deed upon the land; for the first delivery made it his deed effectually; but that could pass no interest, because he was then out of possession; and the second delivery to make it a deed was void, because it was his deed by the first delivery, and therefore cannot be delivered again; and *quære*, in the case above-mentioned, if the letter of attorney were at the conclusion of the deed of lease, in the very same parchment or paper, whether the disseizee could distinguish his sealing and delivery of that as a letter of attorney, so that should not amount to a sealing and delivery of the deed itself, and thereby make void any after-delivery, when the possession and seizin were reduced? The heir, after the death of his ancestor, before any actual entry, may make a lease for years, because the possession in law was cast upon him immediately by the death of his ancestor, and none had possession in fact. But if a stranger first enter by abatement, then such lease made by him after, will be void; because by the entry the stranger gains possession in fact, which divests the possession in law of the heir, so that the heir hath neither posses-

¹ Stephens v. Elliot, Cro. Eliz. 484.

² Perkins, Sec. 154.

³ Goodright v. Straphan, Cowp. 203.

⁴ Plowd. 137 a, 142. See Comyns Dig. tit. Seizin, (A.) 2; Sheppard's Touchstone, 269.

sion in fact nor law, whereof to make a lease, and consequently the lease must be void,¹ A bargainee of a freehold estate, before it is enrolled, still labors under this disability; and subsequent enrollment, within the statutory period, will not give validity to the lease by relation.² The rule is the same in reference to a tenant by dower. She is incapable of demising her estate in the land, until it has been set out to her and seizin has been delivered to her.³ The possession conferred by the statute of uses, is sufficient to enable the *cestui que trust* to grant a lease, without a previous entry into the lands demised.⁴

¹ Comyn's Digest, tit. Seizin, (A.)
2; Sheppard's Touchstone, 269.

² Sheppard's Touchstone, 269.

³ Latwetch v. Autton, Cro. Jac.

⁴ Elliot v. Danby, 12 Mod. 3; 604; Geary v. Bearcroft, Carth. 57;
Bellingham v. Alsop, Cro. Jac. 52. Barber v. Kent, 2 Mod. 249.

CHAPTER XXIV.

AGREEMENT FOR A LEASE.

- SEC. 179. When a present demise.
- SEC. 180. Agreement must be complete.
- SEC. 181. When not a present demise.
- SEC. 182. Entry under agreement for lease—Effect of.
- SEC. 183. Agreement should contain all covenants that are to be embodied in the lease.
- SEC. 184. Statute of frauds—Effect of, upon agreements for leases.
- SEC. 185. Remedies upon valid agreements.
- SEC. 186. Remedy at law.
- SEC. 187. Specific performance of valid agreements.
- SEC. 188. Illegal purposes.
- SEC. 189. Want of authority by intended lessor.
- SEC. 190. Surprise, mistake, fraud.
- SEC. 191. Contract will not be varied.
- SEC. 192. Party will not be compelled to accept less than he contracted for.—May elect to do so.
- SEC. 193. Where anything remains to be fixed or decided by third persons.
- SEC. 194. When contract conditional on lessor's ability.
- SEC. 195. Where intended lessor has no sufficient title.
- SEC. 196. Where the contract is uncertain
- SEC. 197. Common covenants.
- SEC. 198. Not of part of a contract—Exceptions.
- SEC. 199. After unnecessary delay by plaintiff.
- SEC. 200. Oral agreements partly performed.
- SEC. 201. What constitutes part performance.
- SEC. 202. Parties plaintiff in actions for—Defendants.

SECTION 179. When a present demise.—An agreement for a lease will be treated as a present demise, when the agreement does not contemplate the execution of any formal lease, and possession is taken under it;¹ but, if

¹ *Jenkins v. Eldrich*, 8 Story (U. S.) 825; *Emmons v. Kiger*, 23 Ind. 483; *Munson v. Wray*, 7 Blackf. (Md.) 403; *Doe v. Richards*, 4 Ind.

the agreement contemplates the execution of a formal lease, or if anything remains to be done, or if all the ingredients essential to make a lease are not embodied in the agreement, it cannot operate as a lease unless clearly so intended by the parties.¹ The rule may be said to be

374; *Municipality No. 1 v. N. O.*, 5 La. An. 761; *People v. Kelsey*, 38 Barb. (N. Y.) 269; *Bacon v. Bowdoin*, 22 Pick. (Mass.) 401; *Hurlbut v. Post*, 1 Bos. (N. Y. Supr. Ct.) 28. Thus, in a case where by an instrument under seal, and stamped with a lease stamp, W, in consideration of the rents, covenants and agreements therein reserved on the part of C, his executors, &c., to be paid, performed and observed, covenanted, promised, and agreed with C, his executors, &c., that she, W, her heirs or assigns, should and would, at any time during the term thereafter agreed to be demised, upon request made to her or them in writing under the hand of C, his executors, &c., for that purpose, grant and execute to C, his executors, &c.: and C thereby consented and agreed to accept and execute a counterpart of a good and effectual demise or lease of certain premises therein described, for the term of twenty-one years from a day past, determinable as thereafter mentioned, at a certain rent, payable quarterly; and C thereby covenanted to lay out a certain sum in repairing, painting, &c.; and it was agreed, that there should be contained in the said lease and counterpart, by and on the part of C, his executors, &c., a covenant for payment of rent, to repair, &c.; and also a covenant for quiet enjoyment, and a power to C, his executors, &c., to terminate the tenancy in the lease at the end of the third, seventh, or fourteenth year of the term of twenty-one years, on giving a certain notice. It was held an actual demise, and not a mere agreement for a future lease. *Curling v. Mills*, 7 Scott, N. R. 709. So in a case where A, by deed, in consideration of the rents, covenants and agreements hereinafter reserved and contained on the part of B, covenanted to grant to B, at his request, a lease of a house, ha-

bendum for twenty-one years from a day past, but determinable as hereinafter mentioned. B covenants to lay out a sum on the premises; and it is agreed that the lease shall contain a covenant for the payment of rent, and other usual covenants; and also a covenant, as it is also hereby agreed on the part of A, for the quiet enjoyment, &c.; and, in the event of a lease being executed, there shall be contained in the lease a proviso empowering B to determine the tenancy of the lease, &c., the agreement operates as a present demise. *Curling v. Mills*, 6 Man. & G 173.

¹ *Buell v. Cook*, 4 Conn. 238; *People v. Gillis*, 24 Wend. (N. Y.) 201. In *Kabley v. Worcester Gaslight Co.*, 102 Mass. 392, an agreement "to rent or lease" to the defendant, certain described premises, "for the purpose of delivering sand, bricks and cement," and "to be occupied during the construction of the same," was held a present demise, and the lessor having, at the defendant's request, cleared the premises of trees and a building, for such purposes, was held entitled to recover the agreed rent, although the defendant did not occupy the premises under the lease. But, in another case, *McGrath v. Barton*, 103 Mass. 369, where the agreement was: "I hereby agree to let" to the plaintiff a certain house; "he agrees to pay me \$400 per year, monthly," he to do the inside repairs. "I am to do all outside repairs, and at present to fence the yard, repair the cellar and lay a water pipe; and I will make a lease to McGrath of the premises for three, with the privilege of five, years from date," was held not a present demise; and that the plaintiff, who had gone into possession, could not maintain an action against the city for damages for taking, for street widening, a portion of the premises. See also,

that although an agreement between an intended lessor and lessee may possibly amount at law to a present demise or assignment, *yet, if upon the face of the instrument, it appears that a further instrument is necessary to carry the intention of the parties into execution*, a court of equity will decree specific performance of the agreement in that particular, and the instrument cannot be operative as a demise of the premises until such future instrument is executed, either voluntarily by the lessor, or under a decree of the court.¹ Thus, an agreement that A will let B certain premises at a certain fixed rent named in the agreement, *provided* C will consent thereto, is a mere agreement for a lease, because it can become operative only upon a contingency that may never happen;² neither can an agreement be regarded as a lease where no sum as rent is fixed therein, because in that case an essential ingredient of a lease is lacking;³ nor can an agreement that clearly indicates that some future act is to be done, be treated as a lease. Thus, a document entitled "proposals" for letting a farm, stated the quantity of land, length of term and the amount of rent, and, with certain specified alterations, referred to the covenants and provisos of a former lease of the same premises. To this was annexed an agreement as follows: "Agreed to the above rent, *provided* the house, cottages and buildings are put into good tenable repair, on a plan to be mutually determined upon and finally

Becker v. DeForest, 1 Sweeney (N. Y. Superior Ct.) 528, as to the effect of a mere agreement for a lease. In Shaw v. Farnsworth, 108 Mass. 358, a proposal by a tenant at will, for a lease for three years from a certain date, "if the owner would put in a new furnace," and the acceptance thereof by the owner and performance of the condition by him, was held to be a present demise to commence in the future, and not a mere agreement to execute a lease. In Eastman v. Perkins, 111 Mass. 30, at the foot of a receipted bill of sale of hay, headed "P. bought of H." was a memorandum signed by H., as follows: "Left at stable on

O. street, where P. takes possession; rent to begin October 1st, 1870, for one year at \$150. The court held that this was a lease, and that oral evidence was admissible to show that the demised premises consisted of a lot of land on which was a stable, and a small house which had been occupied by H.'s groom, and that the plaintiff took possession thereunder.

¹ Fenner v. Hepburn, 2 You. & C. 156; McGrath v. Barton, 103 Mass. 369; as to when an agreement providing for the execution of a future lease may be regarded as a present demise.

² Buell v. Cook, 4 Conn. 238.

³ Haughery v. Lee, 17 La. An. 23.

settled within one month from the date hereof," and signed by A, was held to be merely a conditional agreement for a future tenancy, and not a present demise;¹ and a similar doctrine was held, where A, by an instrument in writing, not under seal, agreed "to let and grant a lease" of certain mines to B, at a certain rate per ton, for seventy years. The rent was to commence "in a year from the time a pit was sunk through the four-foot coal." B bound himself to commence working a pit before the 24th of the succeeding June, and A bound himself that he had not incumbered the estate so as to prevent him entering into a lease, which lease was to contain "the usual covenants, and as entered into by his brother." A further agreed "to sign a lease upon the said terms, as soon as it can be prepared." In this case it will be observed that the agreement not only contemplated the execution of a lease by the land owner, but also an act to be done by the intended lessee as a condition thereto; and the court held that the agreement, although containing all the requisite elements for a lease, could not operate as a present demise, because it was clearly not intended by the parties that it should so operate.² Whether an instrument is to be construed as a lease or an agreement, *depends upon the intention of the parties, to be collected from the instrument itself, and the nature of the subject-matter, without reference to any*

¹ Wood v. Clark, 9 Jur. 426; but where nothing remains to be done, even though the agreement contemplates that a lease *may* be executed, but leaves the matter in such a way that the execution thereof is optional, rather than otherwise, it will operate as a present demise. Curling v. Mills, 6 M. & G. 178.

² Morgan v. Powell, 8 Jur. 1123. In this case the agreement was dated the 2d February, 1838, and was substantially as follows: A agreed to let and grant a lease to B of "coal iron-mine" certain lands, at certain royalties, for the term of seventy years from the date of the agreement; and it was provided, "that so much royalties as will amount to the sum of 50*l.* a year be worked or paid for during the term,

which rent is to commence in a year from the time a pit is sunk through the four-foot coal: nevertheless, if at any time during the term B should think fit, from the quality of coal being unsound, on giving six month's notice, to quit the same, as if this agreement had never been entered into; and I hereby bind myself to commence sinking a pit before the 24th of June next; and A engages that he has not incumbered the estate to prevent him entering into a lease on the above terms, which lease is to contain the usual covenants, and as entered into by his brother; and A engages to sign a lease upon these terms as soon as it can be prepared."

extrinsic circumstances or subsequent acts of the parties, and even a letter written by one of the parties subsequent to the date of the agreement, is not admissible to show that he intended that the instrument should operate as a lease.¹ If an agreement contains words of present demise, such as "doth let," "hereby lets," &c., and all the elements requisite to a valid lease, the mere fact that it provides for the execution of a future lease, if required, and that such lease shall contain all usual covenants, will not prevent its becoming operative as a present demise,² if the intention of the parties appears to be to

¹ Morgan v. Powell, S. Scott, N. R. 687; Perring v. Brook, 7 C. & P. 860.

² Curling v. Mills, 6 M. & G. 178; Warman v. Faithful, 5 B. & Ad. 1042. "An instrument," says the court, in Livingston v. Kisselbrack, 10 John. (N. Y.) 836, "containing words of present demise, will amount to a lease, though it provides for the execution of a future lease; such provision being treated as a covenant for future assurance." The intention of the parties must control, and if words of present demise are used, such as "doth let," "hereby lets," "doth hereby demise," "hath set and to farm let," and the terms of the demise are explicit, it will be treated as a lease, notwithstanding the fact that the execution of a future lease is provided for, Jackson v. Van Hoesen, 4 Cow. (N. Y.) 825; Thornton v. Payne, 5 John. (N. Y.) 74; Bulkley v. De Lacroix, 2 Wend. (N. Y.) 433; Averill v. Taylor, 8 N. Y. 44; Hurlburt v. Post, 1 Bos. (N. Y.) 28. The words "shall hold and enjoy," Jackson v. Ashburner, 5 T. R. 163; or "I demise, &c." GASELEE J., in Pinero v. Judson, 6 Bing. 212; or "agree to let or lease," Wilson v. Chisholm, 4 C. & P. 474; or "I this day agree to let," Staniforth v. Fox, 7 Bing. 590, &c., &c., are all words of present demise, and so are any words that show an intention on the part of the landlord to give, and of the tenant to take, possession under the instrument. But where an instrument contains words of present demise, but in which are inserted an

agreement by the owner to make alterations and improvements, and by the other party to take a lease when the premises should be so altered and improved; and the term was stipulated to commence from the day that the premises should be altered and improved in the manner agreed on, it was held to be but an agreement for a lease. Jackson De Lacroix, 2 Wend. (N. Y.) 433. So where the intended tenant agreed to repair a mill for the owner for a sum to be paid after the work was finished, and the owner agreed to secure the premises to him until the price was realized out of the profits of the mill, it was held a mere agreement for a lease, and not a demise of the mill. People v. Gillis, 24 Wend. (N. Y.) 201. In Aiken v. Smith, 21 Vt. 173, the defendant entered into a contract with A., in writing, not under seal, by which he agreed "to let" to A. a certain farm, the tenancy to commence on the 1st of April, 1842, and continue from year to year for the term of five years, or so long as the parties should agree and be satisfied, reserving to either party the right to terminate the contract by giving one month's notice in writing, the produce of the farm "to be equally divided by weight or measure between the parties." It was held, that, although this gave to A. an interest in the land, and a right to occupy it without molestation from the defendant, while he continued in the performance of the contract, yet that it did not constitute a lease of the farm, but that A. was a

*give to it that effect and character.*¹ *The intention of the parties, as gathered from the language employed in the instrument, must control, and an instrument which contains words of present demise, which will be given that effect if such appears to be the paramount intention of the parties, although it contains a stipulation for the execution of a future lease, "with usual covenants,"*² but if the agreement provides for the execution of a lease

quasi tenant at will, while the contract continued in force, and that the defendant and A. were tenants in common of the growing crops, and of the produce of the farm before severance. An instrument whereby one party "agrees to let for one year" from its date, and the other party agrees to pay the stipulated rent quarterly, and which declares that it shall continue in force for one year from its date, has been construed to be a present lease. *Hurlbut v. Post*, 1 Bos. (N. Y. Superior Ct.) 28; so an instrument by which one agrees "to lease and rent," and the other "agrees to rent the said premises." *Averill v. Taylor*, 8 N. Y. 44.

¹ *Poole v. Bentley*, 2 Camp. 286. In this case, as reported in 12 East, 168, one agreed to let, and the other agreed to take, certain land, for the period of sixty-one years, at a certain rent for building, and the tenant agreed to expend £2000, within four years, in building five or more houses, and when five houses were covered in, the landlord agreed "to grant a lease or leases (whichever might be for the more convenient underletting or assignment of the leases)," but the agreement was to be considered binding till one fully prepared could be produced: the instrument was held to operate as a present lease. "The rule to be collected from all the cases," said LORD MANSFIELD, C. J., "is that the intention of the parties, as declared by the words of the instrument, must govern the construction, and here, their intention appears to have been that the tenant, who was to expend so much capital upon the premises within the first four years of the term, should have a present legal interest in the term, which was to be binding upon

both parties, though, when a certain progress was made in the buildings, a more formal lease or leases * * might be executed." See also to the same effect, *Pearce v. Chesslyn*, 4 Ad. & El. 225; *Hancock v. Coffyn*, 8 Bing. 858; *Pinero v. Judson*, 6 Bing. 206; *Warman v. Faithful*, 5 B. & Ad. 1042; *Alderman v. Neate*, 4 M. & W. 704; *Phillip v. Benjamin*, 9 Ad. & El. 644; *Chapman v. Bluck*, 4 Bing. N. C. 187; *Pearson v. Ries*, 8 Bing. 178; *Staniforth v. Fox*, 7 Bing. 590; *Walker v. Groves*, 15 East, 244; *Barry v. Myent*, 5 T. R. 165 n.; *Wright v. Trezevant*, 3 C. & P. 441; *Jackson v. Ashburner*, 5 T. & R. 163; *Wilson v. Chisholm*, 4 C. & P. 474.

² *Warman v. Faithful*, 5 B. & Ad. 1042; *Pearson v. Ries*, 8 Bing. 182; *Walker v. Groves*, 15 East, 244; *Paule v. Bentley*, ante. The addition of a clause that a lease shall be made "with usual covenants," does not prevent the agreement from becoming operative as a present lease, because, in all cases, where no other provision is made, it is the right of both parties to have the lease contain those covenants. *Flight v. Barton*, 8 My. & K. 282. And no special covenants can be inserted in a lease, as against carrying on a particular trade therein, or against underletting, &c., &c., unless specially provided for in the agreement. *Probert v. Parker*, 8 id. 280; *Van v. Corpe*, 3 id. 81; *Henderson v. Hay*, 8 Bro. C. C. 652; *Browne v. Rahan*, 15 Ves. 528; *Vine v. Landedon*, 12 Ves. 179; *Church v. Brown*, 15 id. 258; *Jones v. Jones*, 12 id. 187; *Jackson v. De Lacroix*, 2 Wend. (N. Y.) 433; *Livingston v. Kisselbrack*, 10 John. (N. Y.) 336.

with *special* or *unusual* covenants, it is held not to amount to a lease.¹ The fact that the contract is conditional, will not prevent it from operating as a lease, *if the condition is performed or satisfied*,² or waived.³ No particular form is necessary to give an agreement in this effect, nor is it essential that it should be contained in one instrument. It may be made out by letters between the parties. All that is essential is, that there should be an agreement, and that the intention of the parties should clearly appear.⁴ It is enough if there are words showing a present intention, that one is to give and the other to have possession for any determinate time, in whatever form they arise,⁵ whether in the form of a license,⁶ covenant,⁷ or agreement;⁸ and if the words of the instrument are ambiguous, the *acts* of the parties, and their

¹ Burnell v. Curtis, 4 Jur. 490.

² In Chapman v. Bluck, 4 Bing. N. C. 187, TINDAL, C. J., said: "It is said that the contract is conditional only, depending on the defendants being satisfied with the reference for character, and that, being conditional, it conveys no interest. *But upon the defendant's expressing his satisfaction at the character given, the condition is performed and the agreement absolute.*"

³ In Chapman v. Bluck, ante, there was to be a valuation, but the plaintiff having paid the defendant £100 towards the valuation when made, the defendant let him into possession. The court held that this gave the plaintiff more than an inchoate interest, and was really a possession under a demise.

⁴ Chapman v. Bluck, ante; Steel v. Frick, 56 Penn. St. 176; Jones v. Reynolds, 1 Q. B. 506. A., the defendant wrote to his solicitor, who was also the solicitor of E. the plaintiff: "You may make Mr. E. an offer of the T. Hotel at 150l. per annum from Lady-day, 1881; tenant to pay all rates and taxes, except property tax, and do internal and external painting and repairs; the roof and walls to be kept in repair by the landlord. Term, ten years; a proper lease to be drawn up with all proper clauses, and to be

approved by me and my solicitor."

This letter was forwarded to the plaintiff, who at once wrote and accepted the offer. There was some evidence that the defendant knew the plaintiff was a brewer. It was held, that the words, "to be approved by me and my solicitor," did not prevent the letters forming a complete contract, and that the defendant was not entitled to insist on the lease containing a covenant against underletting. (2) A subsequent letter from the defendant to the solicitor, expressing satisfaction that E. had accepted the offer, was tendered in evidence. It was held that the letter was privileged. Eadie v. Addison, 47 L. T. Rep., N. S. 548.

⁵ PARK, B., in Bicknell v. Hood, 5 M. & W. 106; Jackson v. DeLaCroix, 2 Wend. (N. Y.) 483; Bacon v. Bowdoin, 22 Pick. (Mass.) 401; Chicago, &c., Co. v. United States, &c., Co., 57 Penn. St. 83; Walker v. Giles, 6 C. B. 662; Drake v. Munday, Cro. Car. 207; 4 Bacon's Abr. tit. Leases (K.).

⁶ ——— v. Wood, 2 B. & Ald. 724; Hall v. Seabright, 1 Mod. 14.

⁷ Pritchard v. Dodd, 5 B. & Ad. 698; Fenny v. Child, 2 M. & S. 255; Whitlock v. Horton, Cro. Jac. 91.

⁸ Lovelock v. Franklyn, 8 Q. B. 371.

contemporaneous or subsequent dealings under it, may be looked at for the purpose of ascertaining their intention.¹

In England, under the stamp act, the fact that an agreement is stamped as a lease, has been held, in the absence of anything in the agreement indicating a contrary intention, sufficient to indicate the purpose of the parties to have the agreement operate as a lease;² and so generally where there is anything to indicate such an intention the instrument will be construed as a lease.³ Especially is this so when such words as "agrees to let" or "agrees to take" are employed;⁴ and the fact that a more formal lease is contemplated will not change the rule.⁵ An instrument containing an express proviso that it shall not operate as a lease, but only as an agreement, will be construed as an agreement only, although it contains words of present demise, because the intention of the parties must control.⁶ But the intention of the parties, *as gathered from the whole instrument*, must be looked at; and though there is an express provision that the instrument shall operate only as an agreement, yet, if there are subsequent clauses that create an actual demise, the instrument will be so construed.⁷ Thus, where an agreement contained the following clause: "And it is hereby mutually agreed that these presents shall operate as an agreement only, and that until a lease shall be executed, the rents, covenants and agreements agreed to be therein reserved and contained shall be paid and observed, and the several rights and remedies shall be enforced in the same manner as if the same had been actually executed," the concluding stipulation was held to create a tenancy at a fixed rent, for which distress might be made,⁸ and a similar doctrine was held in an earlier case.⁹

¹ Gore v. Lloyd, 12 M. & W. 463.

² Colcombe v. Fidler, Peake's Adv. Cas. 33; Pearce v. Chamberlain, 4 Ad. & El. 225.

³ Wright v. Trezwant, 3 C. & P. 441.

⁴ Pearson v. Ries, 8 Bing. 182.

⁵ Pinero v. Judson, 6 Bing. 206; Anderson v. Midland R. R. Co., 30 L. J. Q. B. 94.

⁶ Perring v. Brook, 7 C. & P. 359.

⁷ Rollason v. Leon, 7 H. & N. 78; Pinero v. Judson, 6 Bing. 206; Anderson v. Midland R. R. Co., ante.

⁸ Anderson v. Midland R. R. Co. 30 L. J. Q. B. 94.

⁹ Pinero v. Judson, ante. An instrument by which A agreed to grant a lease for a certain term

In England, so much litigation originated, and so much conflict of doctrine grew out of contracts of this charac-

upon covenants specified, some of which were inconsistent with a tenancy from year to year, and B agreed to take a lease upon such terms, "and in the mean time, and until the lease should be made, to pay the rent, and hold subject to the covenants, and to repair forthwith, with power of re-entry, before lease executed, on breach of the stipulations," constitutes a letting upon the terms stated. *Pinero v. Judson*, v. Bing. 206. And where, by a written instrument, K agreed to let and P agreed to take a house in its unfinished state for the term of sixty years, being the whole term that K had the same leased to him, at the rent of 525 l. payable quarterly, the first payment to be made for the half quarter at Christmas next, P to insure and to have the benefit of an insurance lately made, a lease and counterpart to be prepared at P's expense, and to contain *all the clauses, covenants and agreements K entered into* in the lease granted to him; it was held, that this was an actual demise, and not a mere agreement for a lease, particularly as P was put into immediate possession. *Pearson v. Ries*, 8 Bing. 178. And in *Chapman v. Bluck*, 4 Bing. N. C. 187, where the plaintiff by letter offered to take a farm of defendant at a certain specified term and rent, the crops to be valued, and a lease to be prepared at the plaintiff's expense, the whole to be subject to a certificate of plaintiff's solvency, and defendant, having received the certificate by letter, accepted of plaintiff as tenant on the terms proposed; the valuation was deferred from time to time; but plaintiff on paying 100l. towards the amount was let into possession; it was held, that the letters of the plaintiff and defendant (at all events as explained by the above circumstances and some admissions made by plaintiff after a distress), constituted an actual demise, on which defendant was authorized to distrain for rent in arrear, and not to a mere agreement for a lease. And an agreement by which A agrees to "let"

premises to B "on lease," for a certain term at a certain rent, "subject to the stipulations and covenants in the original lease under which he holds," and "to keep these stipulations in every respect until the lease shall be granted, which lease, *when required by B*, is to be prepared by A's solicitor at B's expense," is a lease, and not an agreement for one. *Wilson v. Chisholm*, 5 C. & P. 474. So a memorandum by which A agrees to let B certain lands mentioned in an annexed abandoned lease from A to C, upon the conditions and agreements contained in the same lease, and by which A and B bind themselves to execute a lease similar to such abandoned lease, is itself a valid lease. *Pearce v. Cheslyn*, 5 N. & M. 652. A agreed that "B the mills, &c., should enjoy, and engaged to give him a lease for the term, &c., and at the rent, &c." By another part of the agreement "an additional piece of land was to be purchased by A to be added to the land demised." It was held, that this amounted only to an agreement for a lease. *Jackson v. Ashburner*, 5 T. R. 563, cited by BAILEY, J., in *Doe v. Groves*, 15 East 247. And where it appears that there is no present power to lease, and the instrument contemplates a future state of things, it will be considered a mere agreement for a future lease, and not an actual demise; as, where it was agreed that a lease should be granted when the intended lessor should have obtained a lease to himself under a then subsisting agreement between himself and the owner of the premises; *Haywood v. Haswell*, 6 Ad. & El. 265; and an express proviso that the instrument shall not be construed or taken to operate as a lease or actual demise will restrain its operation as such, though it might otherwise amount to a present demise. *Perring v. Brook*, 7 C. & P. 860. It is reported to have been decided that an agreement by A to grant, and B to take, a lease, for a certain term, at a fixed rent, is *per se* only a contract for a future

ter, and in determining whether they were to be treated as leases, or as mere agreements therefor, that by act of parliament in 1845,¹ it was provided that "a lease required by law to be in writing, made after the 1st day of Oct., 1845, *shall be void at law unless made by deed.*" This statute obviates many of the difficulties formerly existing, and applies to all leases "for a term exceeding three years from the making thereof, whereupon the rent reserved to the landlord during such term, amounts to two-thirds part at least of the full improved value of the thing demised."² Under this statute, a contract not under seal for a lease for more than three years, or for three years, to commence at a future day, or for any less time, if the rent reserved is less than two-thirds

demise. *Phillips v. Hartley*, 3 C. & P. 121; see *Clayton v. Burthenshaw*, 5 B. & C. 41; 7 D. & R. 800, S. C. See also *Rawson v. Picke*, 7 Ad. & E. 451. Where the instrument was held to amount to an agreement for a lease, and not an actual lease. If strong circumstances of inconvenience would arise from an instrument being construed as a present demise, that fact may indicate that the intention of the parties was that it should be an agreement only; such as a stipulation that out of the rent mentioned, a proportionate abatement should be made in respect to certain excepted premises; and a stipulation that the tenant "should hold, *under all usual covenants, &c.*" for it may be disputed what are usual covenants. *Morgan d. Downing v. Bissell*, 8 Taunt. 65; *Colley v. Streeton*, 3 D. & R. 522. It is observable that in these cases, the terms of the future lease were not ascertained at the time; where the terms, though not stated, can be collected at once from an instrument referred to by the agreement, as a former lease, &c., the above objection does not apply; see *Pearson v. Ries*, 8 Bing. 178. So where a landlord and tenant, between whom there was a subsisting tenancy, agreed in writing for a letting of the farm upon different terms, the amount of the rent to be settled by valuation, and the

tenant to find sureties for his paying the rent; but the amount was not settled and the sureties were not given; it was held, that the instrument, although it contained words of present demise, did not operate as a lease, or alter the terms of the existing tenancy. *John v. Jenkins*, 1 C. & M. 227. Though it might have been otherwise had the valuation taken place, and the sureties been found. *Chapman v. Bluck*, ante. A agreed "to let premises to B on lease, with a purchasing clause, for twenty-one years, at 63l per year;" B to enter any time on or before a particular day, &c. It was held, that this was only an agreement for a lease, the court saying there were no words of demise, that the commencement of the tenancy was left uncertain, and that the words as to purchasing showed that the letting was to be by a particular instrument containing such a clause. *Dunk v. Hunter*, 5 B. & Ald. 322; *Clayton v. Burthenshaw*, 5 B. & C. 41. See *Brown v. Warner*, 14 Ves. 156. Where there is a sufficient demise of premises, the law implies a promise by the party demising to give possession to his tenant; and *assumpsit* lies against the party letting for the breach of such promise. *Coe v. Clay*, 7 Bing. 440.

¹ 8 & 9 Vict., Chap. 106, Sec. 3.

² 29 Car. 3, chap. 2, sec. 1 and 2.

improved the value of the thing demised, *cannot operate as a lease*, but may operate as *an agreement for a lease*, and as such will be specifically enforced in equity,¹ and in some cases it has been held to create an equitable term, that even a court of law would recognize for some purposes;² but generally, a court of law will not notice an equitable right to a lease under a parol contract, nor give to a subsequently executed lease, relation back to the contract.³ A lease for a term longer than that which by statute can be granted by parol, and which is consequently void at law because not by deed, may, nevertheless, be good in equity as an *agreement for a lease*, and enforced as such:⁴ and, even at law, it may be given the force and effect of an agreement for a lease, and also with respect to any covenants therein, so as to support an action for a breach of such stipulations;⁵ but no action can be maintained for not giving possession under a void lease.⁶ But, if the lessee goes into possession *and pays rent under the lease*, he becomes a tenant from year to year, subject to all the covenants in the lease applicable to such a tenancy.⁷

SEC. 180. **Agreement must be complete.**—The agreement

¹ Cowen v. Phillips, 83 Beav. 18; Parker v. Taswell, 2 DeG. & J. 559; Rollason v. Lion, 7 H. & N. 73; Tidey v. Mallett, 16 C. B. N. S. 298; Bond v. Rosling, 1 B. & S. 371.

² Woodfall's L. & T. 158; Hunt v. Harris, 19 C. B. N. S. 13. If the agreement amounts to a lease, the lessee during his rightful enjoyment, cannot be evicted, as that form of action requires that the plaintiff should have the legal estate. Weakley v. Bucknell, Comp. 473, holding that an agreement for a lease constitutes a valid defence to an action of ejectment, has been over-ruled by innumerable cases, and it is well settled, that *at law*, the mere signing of an *agreement*, and an entry into possession under it by the tenant, during the interval before the lease is executed, creates merely a tenancy at will; Braithwaite v. Hitchcock, 10 M. & W. 497; Hammerton v. Stead, 8 B. & C. 478; Chapman v. Towner,

6 M. & W. 100; determinable *instantly* and without previous notice to quit, except where the statute otherwise provides; Hegan v. Johnson, 2 Taunt. 148; Knight v. Bennett, 3 Bing. 361; unless by payment of rent the tenancy has become one from year to year. Perfect v. Smith, 1 Man. & Ry. 187; Clarke v. Moore, 1 Jo. & La. Lou. 728.

³ Norman v. Wills, 17 Wend. (N. Y.) 186.

⁴ Parker v. Taswell, 2 DeG. & J. 557.

⁵ Rollason v. Lion, 7 H. & N. 73; Hayne v. Cummings, 16 C. B. N. S. 421; Bond v. Rosling, 1 B. & S. 371; Tidey v. Mallett, 16 C. B. N. S. 298; Hunt v. Harris, 19 id. N. S. 13.

⁶ Downy v. McNamara, 5 E. & B. 612; Tress v. Savage, 4 id. 36; Jinks v. Edwards, 11 Exch. 775; Lenatman v. Ambler, 8 id. 72.

⁷ Ken v. Clark, 19 Mo. 132; Drake v. Newton, 23 N. J. L. 111.

in order to have the effect of a present demise, *must be full and complete and must contain all the requisite elements of a lease*. Thus, where no price is fixed by the parties, but the amount of rent is left to the award of a third person, *not named in the agreement*, there is an absence of an essential element to constitute a lease.¹ But where a method of arriving at certainty in any special particular is fixed upon in the agreement, as in the case last cited, if an arbitrator had been named by the parties, the defect would have been cured. Thus, the fact that no precise day is fixed upon when rent is to commence, has been held not sufficient to deprive an instrument of the character of a present lease, *when the party was let into immediate possession under it*.² Certainly, however, as to the amount of rent, and the commencement and duration of the term are essential, and the instrument must either definitely fix them, or contain elements from which they may be definitely ascertained, or it will be treated as an agreement rather than a lease.³ To summarize from the examination we have given the cases, it seems that, whenever an agreement contains words of present demise, and the elements essential to constitute a lease, it will be so construed, however informal it may

¹ *Haughery v. Lee*, 17 L. A. An. 22; *Wright v. Trezevant*, 3 C. & P. 441; *John v. Jenkins*, 3 Tryw. 170; *Warman v. Faithfull*, 5 B. & Ad. 1042.

² *TINDAL, C. J. in Pearson v. Ries*, 8 Bing. 181.

³ "The only principle applicable to cases of this kind," said BEST, C. J., in *Wright v. Trezevant*, 3 C. & P. 441, "is, that if, in the instrument relied on, there is that which in point of law will satisfy the word *lease*, then it will operate as a lease, unless it was the intention of the parties that another instrument should be executed. No particular form of words is necessary. All that is required is, that the premises to be let should be mentioned, and the rent to be paid, and that the commencement and expiration of the term should also appear; and if there be any uncertainty in any of

these respects, the instrument will not be a lease. But if we can find all these particulars set out, then it will be a lease, *if the parties intended that it should be*." In this case the agreement was "between A & B, by which A agrees to pay C £140 a year, in quarterly payments, for a house and garden, &c. (describing the situation), for the term of seven, fourteen or twenty-one years, at the option of the tenant, the rent to commence from the 1st of Jan." The court held the instrument a lease for seven years certain, and after that for fourteen or twenty-one years at the option of the tenant. *Clayton v. Burlinshaw*, 5 B. & C. 41; *Warman v. Faithful*, 5 B. & Ad. 1042; *Pearson v. Ries*, 8 Bing. 178; *John v. Jenkins*, 3 Tryw. 170; *Dunk v. Hunter*, 5 B. & Ald. 322; *Alderman v. Neate*, 4 M. & W. 704.

be, unless from the entire instrument, a contrary intention appears. "It may be laid down for a rule," says BACON,¹ "that whatever words are sufficient to explain the intent of the parties, that the one shall divest himself of the possession, and the other come into for such a determinate period of time, such words, whether they run in the form of a license, covenant or agreement, are of themselves sufficient, and will, in construction of law, amount to a lease for years, as effectually as if the most pertinent and proper words had been made use of for that purpose; and on the contrary if the most proper and authentic form of words whereby to describe and pass a present lease for years are made use of, yet, *if upon the whole deed there appears no such intent*, but that they are only preparatory and relative to a future lease to be made, the law will rather do violence to the words, than break through the intent of the parties."²

¹ 4 Bacon's Abr. tit. Leases, (K.)

² A writing as follows: "Received of B, three dollars and fifty cents, for the rent of my brick house, &c., for one month, with the privilege of keeping it six months at the same rate. No. 91 or 95. December 1st, 1843," has been held good as a lease. So has an agreement as follows: "K agrees to let, and by these presents does let unto W, the said addition to the pier." The addition was not at that time in existence. But the court held that it operated as an actual lease, and that the relation of landlord and tenant was created as soon as W took possession. *People v. Kelsey*, 88 Barb. (N. Y.) 269; *S. C. 14 Abb. Pr. (N. Y.)* 372. See also *Steel v. Frick*, 56 Penn. St. 172; *Hulbut v. Post*, 1 Bos. (N. Y.) 28; *Doe v. Richards*, 4 Ind. 374. A contract by which one is to pay a certain per cent. on the cost of a building, with the right of becoming owner on paying a certain price, is a lease, and these incidental provisions do not change its character. *Municipality No. 1 v. New Orleans*, 5 La. An. 761. See also *Emmons v. Kiger*, 23 Ind. 483. A memorandum upon an abandoned or spent lease, in which

the lessor in such lease "agrees to let" the premises therein described, and binds himself to execute a lease similar to the old lease, is of itself a valid lease. *Pearce v. Chesslyn*, 4 Ad. & El. 225. "G F, does this day agree to let J S, three cottages for ten years; he further agrees to build a brew-house and make a cellar at the rent of £35; he agrees to pay the ground rent, and has this day received £4 from J S, in earnest," was held a lease, and not an agreement for a lease. *Staniforth v. Fox*, 7 Bing. 590. In *Walker v. Groves*, 15 East, 244, by an instrument in writing, the landlord agreed to let, and, also, upon demand, to execute a lease to the tenant of a certain farm, and the tenant on his part agreed to take, and upon demand to execute a counterpart of such lease. The court held that the instrument was a lease, the agreement for a future lease with further covenants being for the better security of the parties. See also *Barry v. Nugent*, 8 Dougl. 179; *Hancock v. Coffyn*, 8 Bing. 858; *Phillip v. Benjamin*, 9 Ad. & El. 644; *Alderman v. Neater* 4 M. & W. 704; *Hulbut v. Post*, 1 Bosw. (N. Y. Supt. Ct.) 28; *Tull*,

SEC. 181. **When not a present demise.**—As previously stated, unless words of present demise are used, or such circumstances exist as show an intention on the part of the parties that the agreement shall have that effect, it cannot be so construed, and this is always the case when the demise depends upon a contingency. Thus, an agreement by A to demise certain premises, "in case it shall turn out that he is entitled thereto,"¹ or in case certain things shall be satisfactory to the intended tenant,² or where the terms are not agreed upon,³ or where by the express terms of the instrument it is not to take effect until a future day,⁴ or where the agreement contemplates the doing of some future act to make it effectual,⁵ or the execution of another instrument to embody the actual contract between the parties,⁶ or where it is expressly

v. Granger, 8 N. Y. 115. In Bacon v. Bowdoin, 22 Pick. (Mass.) 401; A, by a sealed contract, agreed to erect a building for B, and by words of present demise in the same instrument leased it to B for ten years, from the day fixed for its completion, and B agreed to take the building and pay the rent therefor. The court held that this was a lease, and not a mere agreement for one.

¹ Core v. Clare, 2 T. R. 789.

² Bromfield v. Smith, 6 East. 530.

³ Hegan v. Johnson, 2 Taunt. 148; Hougherey v. Lee, 17 La. An. 22.

⁴ Burnell v. Curtis, 4 Jur. 490; Colley v. Stretton, 2 D. & R. 522; Brashier v. Jackson, 6 M. & W. 549; Chapman v. Towner, 6 id. 100.

⁵ People v. Gillis, 24 Wend. (N. Y.) 201. If a person agrees to take a lease for a certain definite term, as, for three years, in case the landlord will make certain repairs and additions to the premises, and the landlord performs the conditions, the agreement is treated as a present demise to commence in the future. Shaw v. Farnsworth, 108 Mass. 357; Holley v. Young, 66 Me. 520; Chapman v. Bluck, 4 Bing. (N. C.) 187; People v. Kelsey, 44 Abb. Pr. (N. Y.) 372. So it seems that it may be operative as a present demise, although it is

left optional with the tenant whether he will assume or continue the relation or not. Thus, the defendant by lease under seal took a tenement at a specified rent, for a year, the lessors agreeing therein "to lease to said Young, said premises at the price and conditions named, so long as he wishes to occupy the same." It was held that this stipulation was not an agreement for a lease, but a lease upon Y's election to remain, and that, by remaining in possession at the expiration of the year, he must be treated as having exercised his election to treat it as a lease. Holley v. Young, 66 Me. 520.

⁶ Tempest v. Rawlings, 13 East, 18; Hegan v. Johnson, 2 Taunt. 148; Dunk v. Hunter, 5 B. & Ald. 822. Words in the future tense as, "A agrees to let to B," or "A agrees that he will lease to B," Warner v. Browne, 8 East, 164; Rawson v. Eicke, 7 Ad. & El. 451; Browne v. Warner, 14 Ves. Jr. 156, or that "he will grant him a lease," Brashier v. Jackson, 6 M. & W. 549; Hammerton v. Stead, 3 B. & C. 478; Phillips v. Hartley, 3 C. & P. 121. The following letters were held to constitute an agreement only, and not a demise from the plaintiff to the defendant. On the 21st of February, 1825, the defendant wrote to the plaintiff: "I shall be happy to

stated in the instrument that it is not to have the effect of a lease, and, generally, unless words are used that show

take a lease of your iron ore at a royalty of 1s. per ton, and I will engage to work the several veins of ironstone, limestone, ore and manganese, in such relative proportions as that the average produce of iron shall not exceed the usual average of the common ores (which I believe to be about forty per cent.), the term to be about forty years from the 24th of June next, and the sleeping rent 150l. per annum. The relative proportion of the iron ores in weight to be worked together, to be ascertained by a competent person." The plaintiff wrote to the defendant in answer: "I agree to the terms contained in your letter. *I shall be ready to grant a lease conformable thereto.*" *Jones v. Reynolds*, 1 Gale & D. 62. Where A, by an agreement under seal, agreed to take and hire of B, a certain house and premises at a certain annual rent, but the instrument contained no words of demise, and there was nothing to show when the term was to commence or determine, it was held only an agreement for a lease; and where by the same instrument A agreed to take the fixtures, stock in trade, and such furniture as should be thought necessary, at a valuation to be made on a future day, it was held not to amount to a conveyance of a present interest in such property. *Clayton v. Burtenshow*, 5 B. & C. 41. And even an agreement by which one agrees to grant and another to take premises for a certain time, at a certain yearly rent, is merely an agreement for a lease, although the intended tenant enters and occupies under it during the whole term. *Phillips v. Hartley*, 3 C. & P. 121. The fact that an instrument contains words of present demise, will not give it the character of a lease if it contains other words that indicate that it was not intended as a lease. Thus, A, by an instrument not under seal, agreed to let and B to take and rent certain premises, "to hold thenceforth for a term of thirty-four years determinable by either party by giving

twelve months' notice, at the end of the first seven, fourteen or twenty-eight years, at a certain yearly rent, clear of all taxes; and B bound himself to keep the premises in tenantable repair during the term, with a further agreement on the part of A *to grant a lease thereof on like terms, with the usual covenants within three months*, was held to be an agreement for a lease, and not a present demise. *Colley v. Stretton*, 2 D. & R. 522. See also to same effect, *Hammerton v. Stead*, 3 B. & C. H. 78. Where a lease was granted to one who afterwards took another into partnership, and both applied jointly to the landlord to enlarge the premises, agreeing to pay 10l. per cent. per annum on the money laid out, which was accordingly done, and the tenants afterwards dissolved partnership:—It was held that the agreement was collateral only to the lease, and not a new demise. *Hoby v. Roebuck*, 6 Taunt. 157. A paper entitled "Memorandum of an agreement between A & B," and signed by them, expressing that, in consideration of 40l., A doth agree to let, and B doth agree to take, a messuage, &c., at 40l. per annum rent; and it is further agreed, that A shall not raise the rent, nor turn out B, so long as the rent is duly paid quarterly, and he does not sell any article injurious to A in his business. Though the terms do not exclude the construction of actual demise, yet as the import of the whole looks to some future instrument, and a more permanent interest than from year to year, a demurrer to a bill for specific performance against A, who had succeeded in an ejectment, was overruled. *Browne v. Warner*, 14 Ves. 156. And see *Warner v. Browne*, 8 East, 164. Where a tenant was in possession under a memorandum of an agreement, whereby the defendant as lessor agreed to let a house on lease for twenty-one years, at the net clear rent of 63l. per annum, the tenant to enter at any time on or before a particular day, on paying the sum of 50l. on

an intention on the part of the parties to the instrument¹ to make it operative as a present demise, it will operate only as an agreement for a future lease.²

SEC. 182. Entry under agreement for lease—Effect of.—

When a person enters into possession under an agreement for a lease, even though it has no validity as an agreement, so that as such, it could be enforced in a court of equity, or damages be recovered for its breach in a court of law, yet, if rent is paid under it, a tenancy from year to year is thereby created, subject to all the terms of the agreement applicable to this species of tenancy, although, until rent is paid or agreed to be paid, the party in possession is a mere tenant at will.³ Actual payment of rent in money or property is not essential, but there must be that which is tantamount thereto. Mere pay-

entry; and there was a purchasing clause in the lease:—It was held, that this amounted only to an agreement for a future lease, and that no lease had been executed. *Dunk v. Hunter*, 5 B. & A. 322. Where A agreed "that he would by indenture demise to B a house for fourteen years from the 25th day of December last past, at the yearly rent of 40*l.*, payable quarterly; but if B should pay A the sum of 40*l.* before the expiration of the first quarter, which would be at Lady-day then next, in that case the rent should be reduced to the rate of 33*l.* per annum, payable quarterly;" it was held, that the agreement was no demise. *Hegan v. Johnson*, 2 Taunt. 148. A similar doctrine was held in reference to an agreement executed on the 24th November upon an agreement stamp, setting forth the conditions of letting a farm, and the regulations to be observed by the tenant, that the term was to be from year to year, the lands to be entered upon on the 3d February, 1808, and the housing on the 12th May, and that a lease was to be made upon these conditions, with all usual covenants, at the foot of which the defendant wrote, "*I agree to take lot 1 (the premises in question), at the rent, &c., subject to the covenants,*" is an agreement for a lease,

and not a present demise, there being no present occupation, and an express stipulation for a future lease, as well as time given to prepare it. *Tempest v. Rawling*, 18 East, 18.

¹ *Anderson v. Midland R. R. Co.*, 80 L. J. Q. B. 94.

² *Barry v. Goodman*, 2 M. & W. 768; *Hammerton v. Stead*, 3 B. & C. 478; *John v. Jenkins*, 1 C. & M. 227; *Colley v. Stretton*, 2 D. & R. 522; *Clayton v. Burtenshaw*, 5 B. & B. 41; *Phillips v. Hartley*, 3 C. & P. 121; *Browne v. Warner*, 14 Ves. Jr. 156; *Rawson v. Eicke*, 7 Ad. & El. 451; *Bromfield v. Smith*, 6 East, 590; *Bicknell v. Hood*, 5 M. & W. 104; *Jones v. Reynolds*, 1 Gale & D. 62; *Warner v. Browne*, 8 East, 164; *Coone v. Clare*, 2 T. R. 789. An agreement to lease, if certain conditions are complied with or if certain contingencies arise, cannot be treated as a lease. *Buell v. Cook*, 4 Conn. 238.

³ *Cox v. Bent*, 5 Bing. 185; *Vincent v. Godson*, 24 L. J. Ch. 122; *Riggs v. Bell*, 5 T. R. 471; *Pennington v. Taniere*, 12 Q. B. 998; *Lee v. Smith*, 9 Exchq. 662; *Clayton v. Blakeley*, 8 T. R. 5; *Tress v. Savage*, 4 E. & B. 36, and a party entering under such an agreement, and becoming a tenant from year to year, cannot abandon the premises and terminate the tenan-

ment of rent does not of itself create a tenancy, *but only furnishes evidence from which the fact may be found.* Therefore, if credit is given to the tenant *as for rent*, it is equally as valuable a fact by which to establish a tenancy, as the *payment* of the rent,¹ as the admission that so much rent is due is equivalent to a payment thereof, as it can be enforced against the tenant as a debt.² The tenancy being from year to year is only subject to the terms of the agreement so far as they are applicable to that relation. If the agreement provides that certain acts shall be done by the tenant inconsistent with a tenancy from year to year, as that he shall point the buildings once in three years,³ or make extensive and expensive repairs at the beginning of the term, the cost of which largely exceeds a year's rent,⁴ or provides that either party shall give two or more year's notice to quit, in those respects the terms of the agreement would not control, because inconsistent with the tenancy.⁵

SEC. 183. Agreement should contain all covenants that are to be embodied in the lease.—It is important that the agree-

cy because the landlord refuses to execute the lease, and the same rule applies where the tenancy is from month to month. In either case the requisite notice to terminate the tenancy must be given. *Scully v. Murray*, 84 Mo. 420.

¹ *Cox v. Bent*, ante; *Vincent v. Godson*, ante.

² *GASELEE, J.*, in *Cox v. Bent*, 5 Bing. 186.

³ *Pinero v. Judson*, 6 Bing. 206. In a recent English case, by an agreement in writing, but not under seal, plaintiff agreed to let and defendant to hire on lease for twenty-one years, a house, etc., on the following terms: The rent to be 55l. per annum; the lease to commence from the 27th of March next, and to contain an extract of the covenants in the original lease, which the plaintiff is bound under; that the proposed lease shall not be sold, parted with, or any portion of the property underlet without the consent in writing of the plaintiff. In the original lease were six covenants by the lessee,

with a proviso for re-entry on the breach of any of them; but there was no covenant not to underlet without the consent of the landlord. Defendant entered and paid rent, and underlet the premises without the consent of plaintiff, who thereupon brought ejectment, and was nonsuited. The court held, that the nonsuit was right. The defendant held as tenant from year to year on such of the terms of the agreement as were applicable to that tenancy. The agreement incorporated the six covenants in the original lease, and the proviso for re-entry on the breach of any one of those covenants; *but the agreement could not be read as applying the proviso for re-entry to the new clause as to not underletting*; and, on the authority of *Shaw v. Coffin*, 14 C. B. N. S. 872, on mere words of agreement a condition cannot be created. *Crawley v. Price*, L. R. 10 Q. B. 802.

⁴ *Pinero v. Judson*, ante.

⁵ *Tooker v. Smith*, 1 H. & N. 732.

ment should embody all the covenants and conditions that are to be embraced in the intended lease, and if the agreement is silent upon this point, *only the usual covenants* can be embodied in the lease when executed, and evidence *dehors* the agreement is not admissible to show that other special covenants were agreed upon.¹ *Usual covenants* are implied in all contracts for leases, so that it is wholly immaterial whether the agreement provides therefor or not.² But it is often difficult to determine what covenants are usual, and what are not, as the matter is dependent upon the custom of the country, and what might be a usual covenant in one locality, might not be so in another; so that common prudence would suggest that, in the drawing of agreements, all the covenants intended to be embodied in the lease should be specified, as the question as to what covenants are usual is one of fact, rather than of law,³ and the burden is upon the lessor to show the fact.⁴ It has been held that a covenant to repair without exception against fire or tempest,⁵ is a usual covenant; so covenants to pay rent, to quit at the

¹ *Proper v. Parker*, 3 My. & K. 280. In *Angell v. Duke*, 32 L. T. N. S. 321, the Court of Queen's Bench considered the admissibility of parol evidence in connection with written agreements. It was held that, where a written contract was entered into, whereby defendant let a house and furniture to plaintiff, evidence of a previous parol promise by defendant to put in more furniture was inadmissible. *COCKBURN, Ch. J.*, said that there were instances of collateral parol agreements which would be admissible, but this was not such a case. "Something passes between the parties during the course of the negotiations, but afterward the plaintiff enters into a written agreement to take the house and the furniture in the house, which is specified. *Having once executed that, without making the terms of the alleged parol agreement a part of it, he cannot afterward set up the parol agreement.*" The other judges were of the same opinion. *ABBOTT, Ch. J.*, in *Kain*

v. Old, 2 B. & C. 627, 534, uses this language: "Where the whole matter passes in parol, all that passes may sometimes be taken together as forming parcel of the contract, though not always; because matter talked of at the commencement of a bargain may be excluded by the language used at its termination. *But, if the contract be in the end reduced into writing, nothing which is not found in the writing can be considered as a part of the contract.*"

² *Wilkins v. Fry*, 1 Mer. 263; *Sharp v. Milligan*, 23 Beav. 419; *Kendall v. Hill*, 6 Jur. N. S. 968.

³ *Bennett v. Womack*, 7 B. & C. 627. In this case *LORD TENTERDEN, C. J.*, said: "I am clearly of opinion that what is a usual covenant, is one of fact for the jury."

⁴ *Church v. Brown*, 15 Ves. 268. See especially remarks of *LORD ELDON*.

⁵ *Kendall v. Hill*, 6 Jur. N. S. 968; *Sharp v. Milligan*, 23 Beav. 419.

expiration of the term, for quiet enjoyment, &c., are usual, because implied even in parol leases.' But covenants not to assign,¹ or underlet without license,² or to carry on particular trades in the demised premises,³ or that the lessee shall personally occupy,⁴ or that rent shall cease if the premises are blown down or burned, have been held *not* to be usual covenants.' "The result of all the authorities," says MR. DAVIDSON,⁵ "appears to be, that in case the agreement is silent as to the particular covenants to be inserted in the lease, and provides merely

¹ *Bandy v. Cartwright*, 23 L. J. Exchq. 285; 8 Exchq. 918; *Vernam v. Smith*, 15 N. Y. 837.

² In *Hampshire v. Wickens*, 38 L. T. Rep. (N. S.) 408, decided in the chancery division of the English High Court of Justice, the defendant entered into an agreement to take a lease of a dwelling-house in Kensington, to contain all usual covenants and provisos. The lease tendered to the defendant contained a covenant not to assign without the lessor's consent, such consent not to be withheld to a respectable and responsible tenant. The present action was brought to enforce the agreement. The court held, that the covenant was not a usual covenant, and the action was dismissed. The authorities upon the subject in England are conflicting. In *Church v. Brown*, 15 Ves. 258, and *Henderson v. Hay*, 3 Bro. C. C. 632, such a covenant was held not to be usual, but in *Haines v. Burnett*, 27 Beav. 500, and *Strangways v. Bishop*, 29 L. T. Rep. (O. S.) 120, the contrary was held. The doctrine of the principal case has also the support of the Court of Appeal in *Hodgkinson v. Crowe*, L. R. 10 Ch. 622, and of the Court of Chancery in the same case, L. R. 19 Eq. 593. In *Hodgkinson v. Crowe*, ante, an agreement for a lease of mines and minerals provided that the lease should contain all usual and customary mining clauses. It was held, that the lessor was not entitled to have inserted in the lease a proviso for re-entry on non-payment of rents and royalties, or if and whenever there should be any breach by the lessee of any of

the covenants and agreements contained in the lease.

³ *Henderson v. Hay*, 3 Bro. C. C. 632; *Buckland v. Papillon*, 36 L. J. Ch. 83; *Vine v. Lovedon*, 12 Ves. 179; *Brown v. Rahan*, 15 id. 528; *Church v. Brown*, 15 id. 258.

⁴ *Propert v. Parker*, 8 My. & K. 280; *Van v. Corpe*, 8 id. 269. In *The Marquis of Bute v. Guest*, 15 M. & W. 160, A agreed to let, and B to take, a piece of land with liberty to build thereon such warehouses, glasshouses, kilns, houses for workmen and other erections necessary for carrying on the business of a glass manufactory, as he should think fit for a term of sixty-one years, at a certain rent; and B agreed to pay the rent, to build in a substantial manner, and not to use the premises for any other purpose than that of a glass manufactory during the term: a lease and counterpart to be executed in conformity with the agreement, in which should be inserted the usual covenants. It was held, that this did not warrant the insertion of an affirmative covenant in the lease, that B *would* carry on the business of a glass manufactory upon the premises during the term. "Nothing," said PARKE, B., "is to be introduced into a lease as a matter of covenant beyond the precise stipulations contained in the memorandum of agreement, unless we can make out clearly that the parties intended something more than they have expressed thereby."

⁵ *Clark v. Clark*, 49 Cal. 586.

⁶ *Medwin v. Sandham*, 3 Swanst. 685; S. C. 1 T. R. 705.

⁷ Davidson's *Precedents on Conveyancing* (8d Ed.) p. 48.

for the lease containing usual covenants, or, which is the same thing, is an open agreement without reference to the covenants, and there are no special circumstances justifying the introduction of other covenants, the following are the only ones which either party can insist upon, namely, covenants by the lessee: (1) to pay rent; (2) to pay taxes, *except such as are expressly payable by the landlord*; (3) to keep and deliver up the premises in repair; and (4) to allow the lessor to re-enter and view the state of repair, and the usual qualified covenant by the lessor, for quiet enjoyment by the lessee."¹ In equity, *the lease*, if one is made in pursuance of an agreement, *and the agreement* will be construed together, unless it is shown that the terms of the agreement were subsequently changed by mutual consent, and the agreement will control the lease as to any matter about which there may be any apparent difference. Thus, in an English case,² H agreed to lease to the plaintiff certain premises, the lease to be in the form annexed to the agreement; and it was provided in the agreement that nothing therein should be construed as giving to the plaintiff a right to any easement which did not belong to the premises to be demised as they then existed, *nor to any right of light and air derived from over the houses opposite*. Subsequently H granted to the plaintiff a lease of said premises, together with the house erected thereon, "*and all cellars, lights, easements, ways, watercourses, privileges, advantages, and appurtenances to the said premises belonging*," being in the form annexed to the agreement. H subsequently leased to the defendants said houses opposite the premises leased the plaintiff; and the defendants pulled the houses down, and began the erection of a new building which was intended to be of a much greater height than the houses so pulled down. It was held, that the lease was controlled by the above provision in the agreement, and that the plaintiff was

¹ See, however, *Wilbraham v. Livesay*, 18 Beav. 206, and *Parish v. Steeman*, 1 DeG. F. & J. 326. The second covenant as to payment

of taxes, is not usual in leases of dwellings.

² *Soloman v. Glover*, L. R. 2 Eq. 444.

not entitled to restrain the erection of the building by the defendants.

SEC. 184. Statute of frauds—Effect of, upon agreements for leases.—In order to give validity either to an agreement for a lease, or to a lease itself, it must be made conformably to the requirements of the Statute of Frauds, in the state where the premises lie. The Statute 29, Car. 2, Chap. 3, Sec. 4, which is peculiarly applicable to agreements, exists in most of the States without essential change. It is therein provided that, “No action shall be brought whereby to charge any person upon any contract or sale of lands, tenements or hereditaments, *or any interest in or concerning them*, unless the agreement upon which such action is brought or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.”¹ And contracts for the future use and occupation of premises come within this provision,² unless they operate as a present demise.

¹ This provision is adopted substantially in Vermont, Sec. 1. Chap. 20, Genl. Stat. 452, the words “promise, contract or” being inserted before the word “agreement.”

² *Inman v. Stamp*, 1 Stark. 12, where an agreement to occupy lodgings at a yearly rent, the occupancy to commence at a future day, was held to come within the provisions of this section of the statute, although LORD ELLENBOROUGH intimates a different rule if possession had actually been taken under the agreement. See also *Evans v. Roberts*, 5 B. & C. 839; *Edge v. Strafford*, 1 Cr. & J. 391. An agreement for a lease from July to May next and from May 1st for one year additional, constitutes but one contract, and is within the Statute of Frauds, *Halzderber v. Forrestal*, 18 Daly (N. Y. C. P.) 35. See also *Prial v. Cutwisth*, 10 id. 398. A and B entered into an oral agreement by which A who owned a parcel of land, was to buy an adjoining parcel at a certain price,

value his own land at a sum named, and erect a warehouse on both parcels according to certain plans; and B was to hire the same for a term of years, at a certain percentage upon the cost of the building and land, at the valuation so agreed upon. In the course of building B asked A to make certain additions and alterations and agreed to pay a certain percentage for the term of lease, upon the cost. The building was erected with such additions and alterations as were requested; but B refused to accept the lease. It was held that the agreement to take a lease was within the Statute of Frauds, and that A could not maintain an action against B for the cost of the land bought and of the building erected less than value at the time of B's refusal to take the lease; and that the agreement for the additions and alterations was not a separate agreement. *Bacon v. Parker*, 187 Mass. 309. A parol lease of land for a term of more than three years is under the Statute of Frauds but a lease at will. A rati-

Under this statute, which, as before stated, is practically in force in all the States, it is not essential that the agreement and memorandum should be contemporaneous,¹ or that it should be contained in a single paper, but a series of papers, as letters,² telegrams,³ and a letter or other

fication of a parol lease of land for a term of more than three years to avoid the effect of the Statute of Frauds, must be signified by writing. This ratification cannot be made by the original lessor after he has conveyed his title to another. The force and effect as well as the interpretation and construction of a writing, as to whether it be a lease or not, is for the determination of the court and not for the jury. A parol demise of land for more than three years in the first instance creates a tenancy at will only, and this satisfies the Statute of Frauds; but that tenancy at will like any other may be subsequently changed into a tenancy from year to year by payment and acceptance of the rent annually, or other circumstances indicating that to be the intention of the parties. Where the lease is from year to year, or for any other indefinite period, notice is necessary to terminate the demise, and must be given three months before the expiration of the term. *Dunn v. Rothermel*, 112 Penn. St. 272. A lease for three years from a time subsequent to the time it was made, signed and sealed by the lessee, and signed by one as agent for the lessor, he affixing a seal to the lessor's name without any authority to execute the said lease which was never accepted or ratified in writing by the lessor, rests no certain term in the lessee; he holds only an estate at will. *Jennings v. McComb*, 112 Penn. St. 528.

¹ *Shippey v. Derrison*, 5 Esp. 198. In New York it has been repeatedly held that a parol lease for one year to commence *in futuro* is not an executory contract, but vests a present interest in the term, and that it is assignable before entry, and that the lessee can bring ejectment if possession is withheld. *Young v. Duke*, 5 N. Y. 468; *Whitney v. Allaire*, 1 id. 307; *Trull v.*

Granger, 8 id. 715, or the tenant may bring an action for damages, or of tort, for withholding the possession. *Trull v. Granger*, ante, and the lessee cannot rescind the contract by notice, before the time for taking possession has arrived, and the lessor is not bound after such notice to let the premises to another. *Becar v. Flues*, 64 N. Y. 518, and a similar doctrine is held in Colorado. *Sears v. Smith*, 3 Col. 287; in Indiana, *Huffman v. Stark*, 31 Ind. 474; but a contrary doctrine is generally held, resulting from the difference in the language employed in the Statute of Frauds in the several States affecting the question. *Parker v. Hollis*, 50 Ala. 411. *Nathan v. Stern*, 18 Daly (N. Y. C. P.) 390; *Smith v. Alt*, 7 id. 492.

² *Lerned v. Wannemacher*, 9 Allen (Mass.) 416; *Tallman v. Franklin*, 14 N. Y. 584; *Parkhurst v. Van Cortlandt*, 14 John. (N. Y.) 15; *Gibson v. Holland*, L. R., 1 C. P. 1. In order to take a contract for a lease of lands out of the Statute of Frauds, any writing executed by either of the parties that tends to establish a consummated contract may be given in evidence as a "memorandum," even though in order to apply it, evidence of conversations between the parties as to the subject matter of the contract are necessary. Thus, the plaintiff had been negotiating with the defendant for the lease of a piece of ground for a strawberry garden. A few days after, he wrote to the defendant to ascertain whether he could have the lands on the terms offered, to which the plaintiff replied, "Set your strawberries." It was held that this was sufficient memorandum to take the case out of the statute. *Lindley v. Tibbals*, 40 Conn. 522, even though there was a misunderstanding as to the terms of the lease.

³ *Palmer v. Marquette, &c., Co.*,

document *signed*, may be used in connection with one previously written, but *not signed*,¹ but not in connection with one subsequently to be prepared.² Letters written to any third person containing directions to carry the agreement into effect, have been held sufficient.³ But in order to be operative as a memorandum, the writing or writings must be something more than a proposal for a tenancy; *it or they must contain all the elements essential to constitute a valid contract, without the aid of extrinsic evidence*,⁴ and must describe the

32 Mich. 274. In an action of contract for breach of agreement to take a lease, it appeared that the defendants' agent wrote to the defendants a letter containing a description of the premises, and stating the annual rent for a term of five years; the questions of the letter being whether the premises and amount of rent were satisfactory to the defendant, but the letter did not state or refer to the particular terms or conditions of a lease. The defendants in answer sent the following telegram: "If basement included at four thousand, secure five years' lease." A letter sent by the agent to the defendants on the day that the telegram was received by him stated that lease at \$4,000 included the basement, and that he would close the matter the next day. The agent had no authority to accept a lease. It was held that, there was not a sufficient memorandum in writing to satisfy the Statute of Frauds; *held*, also, that letters written by the defendants subsequently, referring to an incomplete lease, had no bearing on the question. *Hastings v. Weber*, Mass. S. C., 1887.

¹ *Loomer v. Dawson*, Cheeves (S. C.) 68; *Buxton v. Rust*, L. R. 7 Exchq. 79. Letters, in order to satisfy the statute, must, taken together, amount to a complete contract. *Wright v. St. George*; 12 Ir. Ch. 226; a written proposal signed by the *defendant*, and accepted orally by the plaintiff, is sufficient. *Barker v. Allen*, 5 H. & N. C. 61; *Smith v. Male*, 2 C. B. N. S. 67; *Boys v. August*, 6 Madd. 316; *Reuss v. Picksley*, L. R. 1. Exchq. 342; *Warner v. Willington*, 3 Drew,

528; but a written proposal signed by the *plaintiff*, and accepted orally by the defendant, is not sufficient. *Felthouse v. Bindley*, 11 C. B. N. S. 869. See also the cases last cited.

² *Wood v. Midgeley*, 5 DeG. M. & G. 41.

³ *Gibson v. Holland*, L. R. 1 C. P. 1.

⁴ *Peabody v. Speyers*, 56 N. Y. 230; *Forster v. Rowland*, 7 H. & N. 103; *Watts v. Ainsworth*, 6 L. T. N. S. 252; *Williams v. Lake*, 2 E. & E. 349; *Clarke v. Fuller*, 16 C. B. N. S. 24. It has been held that, where there is a sufficient writing to satisfy the statute, but subsequent to its execution the parties agreed upon certain changes by parol, that the parol changes cannot be enforced, because this would open the door to the very mischief that the statute seeks to prevent. A contract of this character must be *wholly* established by the writing, and cannot be shown partly by writing and partly by parol. *Stead v. Dowher*, 10 Ad. & El. 57; but, unless the *parol changes* in the contract change its character in a material respect, that is, if they were intended to modify, rather than to enlarge or restrict it, it seems that the original agreement may stand. But, whether the modification has the effect of destroying the original contract will depend entirely upon the extent of the change sought to be wrought thereby. *Noble v. Ward*, L. R. 1 Ex. 117; *Price v. Dyer*, 17 Ves. 356; *Moore v. Campbell*, 10 Exchq. 323; *Marshall v. Lynn*, 6 M. & W. 109; *Robinson v. Page*, 3 Russ,

premises with reasonable certainty, ' the duration of the term,' the rent to be paid ' the names of both parties thereto, ' and it must be signed by the party sought to be charged thereby, or by some person by him authorized for that purpose.' It is not indispensable that it should

114; *Martin v. Pycroft*, 2 DeG. & M. & G. 785. There may be a parol waiver of a written contract, and the question in these cases is, whether the changes agreed upon by parol have that effect. *Goss v. Lord Nugent*, 5 B. & Ad. 64. A directed his agent to look for a store for him, and to negotiate for a lease of it. The agent wrote a letter to A, stating that he had been looking at B's store, containing a description of the premises, naming the annual rent asked for a term of five years, and inquiring whether the premises and amount of rent were satisfactory. A telegraphed to the agent as follows: "If basement included at four thousand, secure five years' lease." This telegram was handed by the agent to B, who verbally accepted the offer. It was held that there was not a sufficient memorandum in writing of a contract to accept a lease within the Statute of Frauds to enable B to maintain an action against A. *Hastings v. Weber*, 142 Mass. 232.

¹ *Lancaster v. DeTrafford*, 81 L. J. Ch. 554; *Daniels v. Davison*, 16 Ves. 249; *Ogilvie v. Foljambe*, 8 Mer. 53. But the premises need not be so described that they can be identified, as parol evidence is admissible to identify the particular estate. *Bleakley v. Smith*, 11 Sim. 150; *Price v. Griffith*, 1 DeG. M. & G. 80; *Owen v. Thomas*, 8 My. & K. 853. A reference to preceding deeds is enough. *Owen v. Thomas*, ante; or, "my brick house," or "my house in London," or "the store now occupied by John Doe," or "the house on Cedar Street," or "the building known as Jones' Block," or "the two seams of coal, known as the two-foot coal and the three-foot coal, lying under lands hereafter to be defined, known as Bank End Estate," are all sufficiently definite, because the description makes a basis from which the precise estate

can be shown by parol. *Ogilvie v. Foljambe*, 8 Mer. 61; *Bleakley v. Smith*, ante; *Jenkins v. Green*, 27 Beav. 437; *Lancaster v. DeStrafford*, 8 Jur. N. S. 873; *Haywood v. Cope*, 25 Beav. 140.

² *Fitzmaurice v. Bayley*, 8 E. & B. 664; *Clinan v. Cooke*, 1 Sch. & Lef. 22; *Hughes v. Parker*, 8 M. & W. 244; *Gordon v. Trevadryan*, 1 Price 64; *Clarke v. Fuller*, 166 B. N. S. 24; *Hersey v. Giblett*, 18 Beav. 174; *Blore v. Sutton*, 3 Me. 237; *Hodges v. Howard*, 5 R. I. 149.

³ *Wain v. Warlters*, 5 East, 10. An agreement for a lease at "a fair rent" has been held sufficiently certain; because the tender of an agreement for a lease at a sufficient rent must precede the action for a breach of the agreement to lease, unless the defendant has waived a tender, and such waiver may be inferred when he has put it out of his power to perform. *Weaver v. Wood*, 9 Penn. St. 220; *Baumann v. James*, L. R. 3 Ch. 508; *Powell v. Lovegrove*, 8 DeG. M. & G. 857; *Woolam v. Hearn*, 7 Ves. 211; *Morphett v. Jones*, 1 Swanst. 172.

⁴ *Champion v. Plummer*, 5 Esp.; *Lang v. Henny*, 54 N. H. 57; *Williams v. Lake*, 2 E. & E. 349; *Warner v. Willington*, 3 Drew, 530.

⁵ *Sanborn v. Flagler*, 9 Allen (Mass.) 474; *Stoddert v. Vestry of Port Tobacco*, 2 G. & J. (Md.) 227; *Kyle v. Roberts*, 6 Leigh. (Va.) 495; *Bailey v. Ogden*, 3 John. (N. Y.) 417. The signature must be such as amounts to an acknowledgment by the party, that the agreement is his; and unless such authenticity is thereby given to the instrument, the statute is not satisfied. Therefore, the memorandum *must be signed* by the party to be charged, and it is not enough that his name is inserted in his own hand in the body of the instrument. *Stokes v. Moore*, 1 Cox, 219; nor is it enough that the mem-

be signed by *both* parties, especially as such agreements may properly be unilateral, but it must be signed by the person sought to be charged, 'and accepted by the other.' A partner may sign for the firm, 'or an agent of a corporation for it,' and in the case of a partner he may sign the name of the firm, or his own name, and it may be shown in either case that he signed as agent of the firm, and in any case it may be shown that a person signed as the agent of another.* But, if disputed, the

oranda was drawn up by the person to be charged thereby, with his own hand, and delivered to the other party. The absence of his signature is absolute evidence that he regards the instrument as incomplete. *Bawdes v. Amhurst*, Prec. Ch. 402. But, where an agreement has been signed by one party, and delivered to and acted upon by the other, it is not a valid objection to its being enforced that the party seeking performance has not, also, signed it. *Sutherland v. Briggs*, 1 Hare, 26; *Fowle v. Freeman*, 9 Ves. 351; *Allen v. Bennett*, 3 Taunt. 176; *Huddleston v. Briggs*, 11 Ves. 592; *Martin v. Mitchell*, 3 Jac. & W. 426; *Lathrop v. Bryant*, 2 Bing. N. C. 785.

* *Coles v. Bowne*, 10 Paige Ch. (N. Y.) 526; *Emzy v. Gorton*, 18 Ill. 488; *Frazer v. Ford*, 2 Head. (Tenn.) 464; *Boys v. Ayerst*, 6 Madd. 323; *Liverpool, &c., Bank v. Eccles*, 4 H. & P. 139; *Butter v. Powns*, 2 Coll. 161. It may be in any part of the writing, if it was intended as a signature. *Bleakley v. Smith*, 11 Sim. 150; *Propent v. Parker*, 1 Russ. & My. 625; and either with ink or by pencil. *Selby v. Selby*, 3 Mer. 2.

* *Justice v. Lang*, 47 N. Y. 493; *Sams v. Fripps*, 10 Rich. Eq. (S. C.) 447. A written contract signed by one and acted upon by the other, may be enforced in equity against the one who did not sign it. *Old Colony R. R. Co. v. Evans*, 6 Gray (Mass.) 25; *Clason v. Bailey*, 14 John (N. Y.) 484; *Douglass v. Spears*, 2 N. & M. (S. C.) 207; *Reynolds v. Dunkirk, &c., R. R. Co.*, 17 Barb. (N. Y.) 613. In *Cadwalder's Appeal*, 81 Penn. St. 384, it appeared that Penn in 1784, leased a lot to Wormly for ten thousand

years, at an annual rent, with right of distress and re-entry, to forfeit the lease in default of payment, if there were not sufficient distress on the premises to pay the rent. Wormly died in 1829 without known heirs; App then took possession of the lot; the plaintiff had been agent of Penn before Wormley's death, and so continued until 1838, when Penn's devisee conveyed to him the ground-rent and all the grantor's estate in the lot. No rent having been paid by Wormley, the plaintiff, July 1, 1839, entered for its non-payment, declaring his intention to resume possession. By arrangement with App, in order that plaintiff might make title to him, he removed everything from the lot, and continued in its occupancy to take care of it for plaintiff. In October, 1839, App and plaintiff signed, without seals, a paper by which App agreed "to take the lot," describing it, on a ground-rent of \$60. It was held, that this paper was an agreement in writing, under the Statute of Frauds, for a lease of the land on ground-rent. The requirements of the statute are met by a memorandum in writing signed by the party to be charged therewith. If signed by the vendor alone, and delivered to the vendee, no more is required. It is not necessary that the writing be under seal nor in any particular form of words.

* *Kyle v. Roberts*, 6 Leigh. (Va.) 495; *Stackpole v. Arnold*, 11 Mass. 27.

* *Stoddert v. Vestry of Port Tobacco*, 2 G. & J. (Md.) 227.

* *Higgins v. Senior*, S. M. & W. 834; *Minard v. Mead*, 8 Wend. (N. Y.) 68.

authority of the agent must be proved,¹ and this may be done by showing a subsequent ratification by the principal.² If a person acting as agent signed his own name to the contract, he is personally bound by, and may be compelled to specifically perform it.³

SEC. 185. Remedies upon valid agreements.—There are two remedies open to the parties to a valid agreement for a lease, but the parties must elect which they will pursue, as they can avail themselves of only one of them;⁴ to wit, an action at law for damages for not performing the agreement,⁵ or a suit in equity for a specific performance—and these remedies are open to either party thereto.⁶ Both remedies cannot be pursued at the same time, and if the party pursue his remedy at law and obtains a judgment for damages, he cannot afterwards proceed in equity for specific performance;⁷ and if he commences an action at law for damages, and also in equity for specific performance, he will be compelled to elect which remedy to pursue,⁸ as a court of equity has no discretion to retain the suit, where the plaintiff is also proceeding at law for the same cause of action, except where the proceedings at law are auxiliary to those in equity.⁹ Where a party has brought an action at law and failed, equity will not enforce the contract, unless there have been some circumstances excusing the failure at law, or waiver of the forfeiture on the part of the obligee.¹⁰ But where the cause

¹ *Baines v. Ewing*, 35 L. J. Exchq. 194; *Blore v. Sutton*, 3 Mer. 237; *Foster v. Rowland*, 7 H. & N. 103.

² *Maclean v. Dunn*, 4 Bing. 722; *Bayley v. Fitzmaurice*, 8 E. & B. 664; *Ridgway v. Wharton*, 6 H. L. Cas. 238.

³ *Saxon v. Blake*, 29 Beav. 438.

⁴ A party cannot avail himself of both remedies. *Orme v. Broughton*, 10 Bing. 538; *Sainter v. Ferguson*, 1 Mac. & G. 286; *Dart's Vendors v. Purchasers*, 703.

⁵ *Bond v. Rasling*, 1 B. & S. 371; *Cocking v. Ward*, 1 C. B. 858; *De-Medina v. Norman*, 9 M. & W. 820; *Forster v. Rowland*, 7 H. & N. 103; *Scuter v. Drake*, 5 B. & Ad. 992;

Rollason v. Leon, 7 H. & N. 73; *Jinks v. Edwards*, 11 Exchq. 775; *Hall v. Betty*, 4 M. & G. 410; *Wright v. Calls*, 8 C. B. 150.

⁶ *Cowen v. Phillips*, 33 Beav. 18; *Parker v. Taswell*, 2 DeG. & J. 557; *Pain v. Combs*, 3 Sm. & Giff. 449.

⁷ *Sainter v. Ferguson*, ante; *Marston v. Humphrey*, 24 Me. 513.

⁸ *Fennings v. Humphrey*, 4 Beav. 1; *Ambrose v. Nott*, 2 Hare, 649; *Roule v. Wynne*, Cr. & Ph. 252.

⁹ *Roule v. Wynne*, ante; *Barker v. Smark*, 1 Russ. & M. 423 n. 1.

¹⁰ *Tevis v. Richardson*, 7 B. Mon. (Ky.) 654; *Allen v. Beal*, 3 A. K. Mar. (Ky.) 554.

is not the same, as, where the action at law is brought for the non-performance of particular acts only, as for not improving or repairing the property, the performance of which is not specifically prayed for, or for acts the specific performance of which cannot be decreed, and the action is brought only for damages sustained up to the time of its commencement, the party is not driven to his election, because there is no conflict of jurisdiction or remedies.¹ So, too, in some cases, a party may have his remedy in equity, when he has lost his remedy at law by reason *laches* on his part, as, by permitting the day to go by on which he ought to have performed or offered to perform,² or some other condition precedent, he may still have his remedy in equity, because, in the language of ANDERSON B.,³ while "at law, time is always of the essence of the contract; in equity the contract is considered as a purchase of land for money, without reference to the time when the title is to be made out."⁴ But to entitle him to this equitable remedy, there must have been a substantial performance, or offer to perform on his part, or *circumstances that excuse it*, so that in equity and good conscience the agreement⁵ ought to be performed.

SEC. 186. *Remedy at law.*—Either party may maintain an action at law, for the breach of a complete and valid agreement to make or take a lease of premises.⁶ But, in order to maintain an action for such breach, the agreement must be full, complete and perfect in all the essential elements requisite to make a lease, and not a mere proposal therefor.⁷ In an action upon an agreement, the

¹ Fennings v. Humphrey, 4 Brev. 1.

² Tidey v. Mollett, 16 C. B. N. S. 298; Berry v. Young, 2 Esp. 640 n.; Stowell v. Robinson, 3 Bing. N. C. 928.

³ Hanslip v. Paderick, 5 Exchq. 623.

⁴ Cartan v. Bury, 10 Ir. Ch. 387; Davis v. Hone, 2 Sch. & Lef. 841; Sugden's Vendors (14 Eng. Edn.), 212; Fry on Specific Performance, 4.

⁵ Coale v. Barney, 1 G. & J. (Md.) 324; Voorhees v. DeMeyer, 2 Barb. (N. Y.) 37; Guest v. Homfrey, 5 Ves. 818; Jones v. Price, 3 At. 924; 2 Tudor's Leading Cases, 443; Paine v. Miller, 6 Ves. 349; Smith v. Burnham, 2 At. 527.

⁶ Ridgway v. Wharton, 6 H. L. Cas. 238; Forster v. Rowland, 7 H. & N. 103.

⁷ In Forster v. Rowland, ante, the defendant having proposed to take a lease of premises for seven

plaintiff may recover back any sums which he has paid the defendant, as well as the actual damage he has sustained.¹ Generally, an action will not lie until the day arrives for the execution of the lease; but if the defendant previously to that time has disabled himself from the performance of the agreement, as, by a sale of the property, or by granting an inconsistent lease, the other party may bring his action at once, as such acts are regarded as a breach of the contract.² If an action is brought by the intended lessor against the intended lessee for not taking the lease, the latter may defend upon the ground that the plaintiff has no title to grant such a lease as he contracted to grant, as in all such cases the lessor impliedly undertakes that he has titled under right to grant such a lease;³ and, a lessee being regarded as a purchaser *pro tanto*, he has a right before accepting the lease to be satisfied as to the lessor's title, and to call for an inspection of it.⁴

SEC. 187. *Specific performance of valid agreements.*—A decree for the specific performance of agreements for leases, in all respects complying with the provisions of the Statute of Frauds, and entered into by parties competent on the one hand to lease, and on the other to take a lease, is almost as much a matter of course in a court of equity, as are damages for their breach in a court of law.⁵ The fact that the party has a remedy at law for

years, a draft lease was prepared, to which the defendant objected, but he ultimately took it away to be settled by his solicitors, and the solicitors afterwards returned it to the plaintiff's solicitors with the following letter: "We have seen our client, and have altered the draft lease in accordance with his suggestions; we trust there will be no impediment to prevent an early completion, and shall be glad to receive the draft as soon as you can, that we may engross the counterpart." The plaintiff's solicitors returned the papers, stating that, according to the practice, where there is no stipulation on the subject, the lessor's solicitor invariably prepares the lease, &c.

After some further correspondence, the defendant refused to execute the lease; and in an action by the intended landlord against the intended tenant to recover damages for a breach of the agreement to lease, the court held that no valid agreement was shown.

¹ Wright v. Calls, 8 C. B. 150.

² Ford v. Tiley, 6 B. & C. 325.

³ Gevillim v. Stone, 3 Taunt. 432; Strauks v. St. John, L. R. 2 C. P. 376; Roper v. Coombes, 6 B. & C. 534; Temple v. Brown, 6 Taunt. 60.

⁴ Sugden's Vendors, 141; Purvis v. Rayer, 9 Price, 488; Keech v. Hall, 1 Doug. 21.

⁵ White v. Tudor's Leading Cas.,

damages, affords no objection to the exercise of this jurisdiction, as it is presumed that such compensation

645; Hall v. Warren, 9 Ves. 608; Chance v. Beall, 20 Ga. 143; Hooper v. Hooper, 16 N. J. Eq. 147; Rogers v. Sanders, 16 Me. 92. Courts of law have no power to enforce specifically the performance of any contract or obligation. Its power and jurisdiction extends only to the giving of damages for its breach or non-performance, no matter how unconscionable or inequitable it may be to compel a party to accept such redress; and, it can give damages for the breach of the contract only according to the legal interpretation of the language employed, although it does not in fact express the real intention of the parties, or the contract actually made by them. But courts of equity, taking up jurisdiction from the outer limits to which courts of law can go, are endowed with ample power not only to correct any mistakes made by the parties, in the contract itself, but also, in a proper case, to compel the parties to perform it, according to its true intention as gathered from the language used, and the subject matter to which it relates. This jurisdiction, however, will be exercised only when, in view of the terms of the contract, and the circumstances surrounding it, equity and good conscience requires that the parties should substantially perform that which they have contracted to perform, and will not compel either party to perform, when such performance would be inequitable or unconscionable. Barnett v. Spratt, 4 Ired. (N. C.) Eq. 171; Kimberly v. Jennings, 6 Sim. 340; Clarke v. Rochester, &c., R. R. Co., 18 Barb. (N. Y.) 350; Gould v. Kemp, 2 My. & K. 308; Canaday v. Shepherd, 2 Jones (N. C.) Eq. 224; Wardsworth v. Manning, 4 Md. 59; Roundtree v. McLain, 1 Hempst. (U. S. C. C.) 245; Durall v. Myers, 2 Md. Ch. 59. And this is so, even though the contract is one that, if executed, it would set aside. Barksdale v. Payne, Riley (S. C.) Ch. 174; Clithwall v. Ogilvie, 1 Dessau (S. C.) 250. The court is vested with large discretion in this respect, but this dis-

cretion must be *reasonably* exercised, Howard v. Moore, 4 Sneed. (Tenn.) 817; Humbard v. Humbard, 3 Head (Tenn.) 100; Hester v. Hooker, 15 Miss. 768; Auter v. Miller, 18 Iowa 405; Blackwilder v. Loveless, 21 Ala. 371; Pulliam v. Owen, 25 id. 492; Pigg v. Corder, 12 Leigh (Va.) 69; Leigh v. Crump, 1 Ired. (N. C.) Eq. 299; Ash v. Dagg, 6 Ind. 259; McMurtie v. Bennett, Harr. (Mich.) 124, and the relief prayed for, cannot be arbitrarily (Rogers v. Saunders, 16 Me. 92; Henderson v. Hays, 2 Watts (Penn.) 148; Meeker v. Meeker, 16 Conn. 403; Broadwell v. Broadwell, 6 Ill. 599; Pigg v. Corder, 12 Leigh (Va.) 69; Leigh v. Crump, 1 Ired. (N. C.) Eq. 299; Turner v. Clay, 3 Bibb (Ky.) 52; Tobey v. Co. of Bristol, 3 Story (U. S. C. C.) 800; Rogers v. Saunders, 16 Me. 92; Rudolph v. Cowell, 5 Iowa 126; Seymour v. Delancey, 6 John. Ch. (N. Y.) 223; Gould v. Womack, 2 Ala. 83; Smart v. Rea, 19 Md. 398; Pickering v. Pickering, 38 N. H. 400; King v. Morford, 1 N. J. Eq. 274, or capriciously granted or denied. Bowen v. Irish, &c., Congregation, 6 Bos. (N. Y. Sup'r. Ct.) 245; Griffith v. Frederick Co. Bank, 6 G. & J. (Md.) 424; Cathcart v. Robinson, 5 Pet. (U. S.) 263; McWhorter v. McMahan, 1 Clarke's Ch. (N. Y.) 400; Humbard v. Humbard, 3 Head (Tenn.), 100; Waters v. Howard, 8 Gill. (Md.) 262; Frisby v. Ballance, 5 Ill. 287; Watts v. Rogers, 2 Abb. Pr. (N. Y.) 261; Faure v. Martin, 7 N. Y. 210; Veeder v. Fonda, 3 Paige's Ch. (N. Y.) 94. A bill for the specific performance of a contract, is addressed to the *sound and reasonable* discretion of the court, and, while not strictly a matter of right, is nevertheless so much so, that an error in these respects will be revised by an appellate tribunal. The matter is regulated by certain rules and principles that the court *must* regard, and any deviation therefrom is error that an appellate tribunal will rectify. Seymour v. Delancey, 3 Cow. (N. Y.) 345; Meeker v. Meeker, 16 Conn. 403; Tyson v. Watts, 1 Md. Ch. 18.

will not put him in as beneficial a position as if the agreement was performed.¹ But, as a condition precedent to the exercise of such jurisdiction, the contract must be complete² and certain,³ and susceptible of proof by the

Cowenhoven v. Brooklyn, 38 Barb. (N. Y.) 9; St. John v. Benedict, 6 John. Ch. (N. Y.) 111.

¹ Harnett v. Yielding, 1 Sch. & Lef. 553. The rule is, that equity will specifically enforce performance when that alone will answer the purpose of justice. Stuyvesant v. Mayor, &c., 11 Paige (N. Y.), Ch. 414; and the court will be careful to see that the exercise of this jurisdiction does complete justice. King v. Mumford, 1 N. J. Eq. 274.

² And the terms of it so precise as that neither party could reasonably misunderstand it. If it is vague, indefinite or uncertain, or the evidence to establish it is insufficient, this remedy will be withheld. Lockerson v. Stilwell, 13 N. J. Eq. 357; Bowman v. Stilwell, 78 Ill. 48; Colson v. Thompson, 2 Wheat. (U. S.) 836; Minturn v. Bayliss, 33 Cal. 129; Odell v. Morin, 5 Oreg. 96; Thynne v. Glengall, 2 H. L. Cas. 131; Martin v. Holley, 61 Mo. 196; Miller v. Cottin, 5 Ga. 341; Burke v. Creditors, 9 La. An. 57; Fitzpatrick v. Beatty, 6 Ill. 454; and, unless partly performed, the subject matter must be susceptible of identification from the description in the contract, "the 120 acres in Shannon County, Missouri," without any other words of identification, was held insufficient, as the land could not be identified without a resort to parol evidence. Miller v. Campbell, 52 Ind. 125. But if it had been "the 120 acres of land owned by me in A—, Shannon County, Missouri," it would doubtless have been regarded as sufficient. Lynes v. Hayden, 118 Mass. 482; Lewis v. Reichy, 27 N. J. Eq. 240; Colerick v. Hooper, 3 Md. 316. So when it was sought to have a contract specifically enforced, where the defendant agreed, in consideration that certain land was conveyed to him, to "erect a certain building," it was held too uncertain. Martin v. Holley, ante. The bill must set out a contract which is clear and

definite in all essential details. Wright v. Wright, 81 Mich. 880; Stanton v. Miller, 58 N. Y. 192; Reese v. Reese, 41 Md. 554. Where the contract is incomplete in any essential respect, and furnishes no means of identifying the property with certainty, this remedy will be denied. Patrick v. Horton, 3 W. Va. 23; Hammer v. McEldowney, 46 Penn. St. 334; Southern Ins. Co. v. Cole, 4 Fla. 359; Ohio v. Baum 6 Ohio, 383; Jordan v. Deaton, 23 Ark. 704; Prater v. Miller, 5 Jones (N. C.) Eq. 153. "The houses in Smithfield St.," without other designation, held too uncertain. Hammer v. McEldowney, ante. When the writing appears to be only the basis of an agreement and not the agreement itself, there is no binding agreement. Frost v. Moulton, 21 Beav. 496; or when it provides that any of the terms shall be afterwards settled. Wood v. Midgeley, 5 DeG. M. & G. 41; Honeyman v. Maryatt, 21 Beav. 14; or that further negotiations are contemplated. Stratford v. Bosworth, 2 V. & B. 341; Tawney v. Crowther, 3 Br. & C. C. 318; and if it is doubtful whether a positive agreement exists, the court will not interfere, all the terms must be settled. Huddleston v. Briscoe, 11 Ves. 592; Jackson v. Oglander, 2 H. & M. 465. But if all the terms are settled and agreed upon, the fact that a more formal instrument is contemplated is not sufficient to defeat this relief. Skinner v. McDowall, 2 DeG. & S. 265.

³ If there is a doubt as to whether the parties understood the contract alike, fairly arising from the language of the contract, it will not be enforced. Cowles v. Bowne, 10 Paige (N. Y.), Ch. 526; Buckmaster v. Thompson, 36 N. Y. 558. The term or duration of a lease is an essential part of it, and specific performance will not be decreed when the contract does not specify the term. Myers v. Forbes, 24 Md. 598. In an agreement to renew a

writing itself,' unless in part performed.' It must also be mutual' and fair, and just in all its parts, 'and other-

lease at as much rent as any one else would pay, it was left optional with the lessee to accept it or not, and it was held lacking both in certainty and mutuality. *Gelston v. Sigmund*, 27 Md. 334; *Heywood v. Cope*, 25 Beav. 140; *Taylor v. Partington*, 7 DeG. M. & G. 328; *Parker v. Taswell*, 2 DeG. & J. 559. Where the rent is to be afterwards fixed, and this has not been done, the contract is too incomplete and uncertain. *Graham v. Call*, 5 Munf. (Va.) 396. When a contract of this character, or any other, is uncertain and vague, the court will leave the parties to their legal remedies. *Maddox v. McQueen*, 3 A. K. Mar. (Ky.) 400; *McKibbin v. Brown*, 14 N. J. Eq. 13; *Dobson v. Litton*, 5 Coldw. (Tenn.) 616; *Sales v. Mickman*, 20 Penn. St. 180. Thus, a clause in a lease which reads "and the party of the first part agrees, in case the said parties of the second part shall then be tenants of said premises, to first offer the property so demised for sale to and purchase by them for the sum of \$2,000," was held too uncertain for enforcement, because there was no time fixed within which it was to be performed, nor any agreement that the lessor should convey to them at any time for that sum while they were tenants. *Buckmaster v. Thompson*, 36 N. Y. 558. So a stipulation to renew a lease at its expiration, "the rent to be proportioned to the valuation of said premises at said time," and providing no method for determining the valuation, was held too uncertain to be specifically enforced. *Pray v. Clark*, 113 Mass. 283.

¹ *Dobson v. Litton*, ante, 118; *Hammer v. McEldowney*, 46 Penn. St. 334. By this, it is not meant that parol evidence to identify the property is never admissible, but that the writing must furnish such a basis therefor that by the aid of parol evidence absolute certainty can be arrived at. Thus, an agreement "for the sale of houses on Smithfield Street" was held too uncertain, because the contract furnished no guide by which to

arrive at a certainty as to what houses were intended. *Hammer v. McEldowney*, ante. But if it had been "for the sale of my houses, &c.," or "houses owned by me, &c.," absolute certainty could have been arrived at, because the houses owned by him could have been identified. *Colerick v. Hooper*, 3 Ind. 316; *Lewis v. Reichy*, 27 N. J. Eq. 240; *Lynes v. Hayden*, 113 Mass. 483; *Puttman v. Haltey*, 24 Iowa, 425. The term and duration of the lease, *Myers v. Forbes*, ante, as well as the amount of rent, must be definitely stated. *Gelston v. Sigmund*, 27 Md. 345.

² *Lester v. Foxcraft*, 1 Coll. C. C. 108. In an Illinois case an agreement to convey a right of way 80 feet wide, was held to have become sufficiently certain to be enforced, after the grantee, with the acquiescence of the grantor, had entered upon the land and laid out the way. *Purinton v. Northern Ill. R. R. Co.*, 46 Ill. 297.

³ And the parties must both be bound by the contract, the one to give and the other to take the lease. *Gieger v. Green*, 4 Gill. (Md.) 472; *Hawralty v. Warren*, 18 N. J. Eq. 124; *Benedict v. Lynch*, 1 John. Ch. (N. Y.) 370; *McMurtrie v. Bennett*, Harr. (Mich.) 124; *Jones v. Noble*, 3 Bush. (Ky.) 694; *Bodine v. Glading*, 21 Penn. St. 50. But an agreement has been held enforceable in equity, when only binding upon the party sought to be charged, *Rogers v. Saunders*, 16 Me. 9, and predicated upon a good consideration. *Matter of Hunter*, 1 Edw. Ch. (N. Y.) 1; *Hawralty v. Warren*, ante.

⁴ *Muller v. Vettel*, 25 How. Pr. (N. Y.) 350. Only those contracts which are fair, just, and reasonable, will be specifically enforced in equity. *Andrews v. Andrews*, 28 Ala. 432; *Thompson v. Tod*, Pet. C. Ct. 380; *Gould v. Womack*, 2 Ala. 83; *Ellis v. Burden*, 1 Ala. Sel. Cas. 458; *Lucas v. Burnett*, 1 Greene (Iowa) 510; *Carberry v. Tannehill*, 1 H. & J. (Md.) 224; *Griffith v. Frederick County Bank*, 6 Gill & J. (Md.) 424; *Waters v.*

wise unobjectionable. If there is danger that the defendant will be exposed to expensive litigation to maintain or ascertain his rights under the lease, the agreement will not be enforced,¹ nor if there is any doubt as to the lessor's title,² nor if there are two or more lessors, if the interests of some of them would be injuriously affected thereby,³ nor if the building is new, and shown to be in such an unsafe condition that it is likely to subject the tenant to an unreasonable or extraordinary expense for repairs, especially when its condition could not readily have been ascertained by inspection,⁴ but it seems that this rule does not apply to an old building or one whose defects are readily ascertainable.⁵ A decree will not be made for the specific performance of a contract relating to stock or other chattels,⁶ nor for the perform-

Howard, 1 Md. Ch. 112; Smith v. Crandall, 20 Md. 482; Daniel v. Frazer, 40 Miss. 507; Rodman v. Zilley, 1 N. J. Eq. 820; Stoutenburg v. Tompkins, 9 N. J. Eq. 832; McWhorter v. McMahan, 1 Clark (N. Y.) 400; Leigh v. Crump, 1 Ired. (N. C.) Eq. 299; Cannaday v. Shepard, 2 Jones (N. C.), Eq. 224; Farr v. Glading, 1 Phil. (Penn.) 872; Hall v. Ross, 3 Hayw. (N. C.) 200; Rice v. Rawlings, Meigs (Tenn.), 496; Eastland v. Vanarsdel, 3 Bibb (Ky.) 274; Wingate v. Fry, Wright (Ohio) 105; McCarty v. Kyle, 4 Coldw. (Tenn.) 848; Smith v. Wood, 12 Wis. 392, but where a contract is fairly made and without mistake, by competent parties, upon good consideration, and unattended with any circumstances which make its enforcement inequitable, a mere naked hardness of bargain is no valid objection to its enforcement in equity. Morrison v. Peay, 21 Ark. 110, but when it is so hard and unconscionable as to create a strong suspicion of fraud, it will not be enforced. Perkins v. Wright, 3 Har. & M. (Md.) 324; Edwards v. Handley, Hard. (Ky.) 602.

¹ Pegler v. White, 33 Beav. 403.
² Owings v. Baldwin, 8 Gill (Md.) 337; Garnet v. Macon, 6 Call (Va.) 308; Creigh v. Shotts, 9 W. & S. (Penn.) 82.

³ Society, &c. v. Law, 19 N. J. Eq. 19.

⁴ Tildesly v. Clarkson, 30 Beav. 419.

⁵ In Johnson v. Smart, 2 Giff. 151, the house was described as substantial and convenient, and having five bedrooms. It was held, that a specific performance could not be defeated, although the house was out of repair, and the wall in some places only a half a brick thick, and some of the bedrooms were extremely small, and without fire-places; there being no misdescription. See also Cook v. Waugh, 2 Giff. 201. The fact that the circumstances were such as might easily have led to fraud, in the absence of experience in such matters, in the absence of any actual fraud or misrepresentation on the part of the plaintiff, it has been held insufficient to prevent the specific enforcement of the contract, Lightfoot v. Heron, 3 You. & C. 586, and the same rule is held when there is only a misrepresentation as to the legal rights of the defendant. Great Western R. R. Co. v. Cripps, 5 Hare. 91; Kendall v. Hill, 6 Jur. N. S. 968.

⁶ The reason being that a complete remedy exists at law, as the party can purchase other property of the same kind and recover the difference. Cuddee v. Rutter, White & Tudor's L. C. 640; Ross v.

ance of a contract for a tenancy for a single year or from year to year,' nor where the term agreed upon has expired, or would expire before the decree could be carried into execution,' nor where it is shown that the intended lessee has become insolvent and unable to perform the covenants agreed upon.* Nor will it decree the specific performance of a contract for a lease, when one of the conditions is that the lessee shall engage the personal services of the lessor in the business for which the premises are to be used,' nor where the party applying, has failed to perform any of the stipulations in the agreement, upon the performance of which the making of the lease was conditional,' nor where he has been guilty of fraud in inducing the other party to enter into the agreement,' or has, through misrepresentation and deceit, inveigled him into the contract,' nor where he has been guilty of a fraudulent concealment of important facts.' But, where neither party knows of the existence

Union Pacific R. R. Co., 1 Wood (U. S. C. C.) 26.

¹ Morlat v. Lyons, 8 Ir. Ch. 112; Clayton v. Illingworth, 10 Hare, 451.

² Nesbit v. Meyer, 1 Swanst. 226; Brassae v. Martyn, 11 W. R. 1020; Walters v. Coal Co., 5 DeG. M. & G. 629.

³ Neale v. Mackenzie, 1 Keen, 474. But there must be proof of general insolvency, and proof of a particular default in the payment of rent of other premises will not disentitle him to this remedy. See opinion of LORD LONGDALE, M. R., in the case last cited. "As a lessee remains liable to the determination of the term," said LORD ELDON, in *Buckland v. Hall*, 8 Ves. 92, "it is of great importance to the lessor to take care that the lessee shall be a man of substance, and insolvency, therefore is a weighty objection to a specific performance of an agreement for a lease." And in that case, the plaintiff being already in as assignee under a lease, the defendant had agreed to grant him a new lease. But the defendant refused to perform, and the plaintiff brought a bill for specific performance and obtained an injunction against the

defendant restraining him from maintaining ejectment. Afterwards the plaintiff became insolvent and settled his debts for 9s. on the pound, and upon that and other grounds the injunction was dissolved. In *Price v. Asspeton*, 1 Yo. & Coll. 441, the court refused to entertain a suit for specific performance of a covenant in a lease for renewal, upon the ground that the plaintiff had become insolvent, the court holding that it had no power to compel a landlord to take an insolvent person as lessee.

⁴ Ogden v. Fossick, 32 L. J. Ch. 78. The courts will not enforce the performance of contracts relating to the personal services of either party. *Sanguivico v. Beneditti*, 1 Barb. (N. Y.) 315; *De Rivasinoli v. Corsetti*, 4 Paige, Ch. (N. Y.) 270.

⁵ Jones v. Roberts, 6 Call. (Va.) 187; *Harvie v. Banks*, 1 Rand. (Va.) 408.

⁶ Higgins v. Laurels, 2 Johns. & H. 460; *Flight v. Booth*, 1 Bing. N. C. 370.

⁷ Willingham v. Joyce, 8 Ves. 168; *Moxey v. Bigwood*, 10 Jur. N. S. 597.

⁸ Ellard v. Lord Llundall, 1 B. & P. 241; *Boscomb v. Phillips*, 13

of objectionable circumstances, although easily ascertainable by the lessor, as, of the existence of a nuisance in the vicinity of a dwelling that renders it unfit for that purpose, yet, in the absence of any representations as to the condition of the premises or their surroundings that have misled the lessee or thrown him off from inquiry, the existence of such nuisance affords no ground for refusing to enforce the agreement.¹ Even a false statement as to the condition of premises made by the plaintiff will not defeat this remedy, unless the statement was the means of inducing the bargain. If, notwithstanding the representation, the lessee examined the premises for himself, and relied upon his own judgment, or if, when made, he knew the statements to be false, he cannot claim that he was misled or deceived thereby.² If the agreement is hard and unconscionable the court will sometimes refuse to enforce it.³ The power of a court of equity to enforce the specific performance of a contract should be exercised under the sound discretion of the court, with an eye to the substantial justice of the case; *and where a contract is hard, and destitute of all equity*, the court will leave the parties to their remedy at law, and if such remedy has been lost by negligence, they must abide the consequences.⁴ But much depends upon the nature of the hardship and *when* and *how* it arose.⁵ If the hardship arises from circumstances that occurred *after* the contract was entered into, equity cannot relieve the party, as, if after the agreement is made the buildings are destroyed by fire, tempest or flood, or other casualty, the contract will be enforced.⁶ So where the

Jur. N. S. 363; *Maxwell v. Port Tobacco, &c., Co.*, 24 Beav. 495, and where a party is induced to take a lease either by misrepresentation or a fraudulent concealment of facts, the court will rescind it. *Ballard v. Way*, 1 M. & W. 520.

¹ *Lucas v. James*, 7 Hare, 410. *S. P. Old Colony R. R. Co. v. Evans*, 6 Gray (Mass.) 25.

² *Phipps v. Buckman*, 30 Penn. St. 401.

³ *Chubb v. Peckham*, 13 N. J. Eq. 207; *Reed v. Rudmun*, 5 Ind.

409; *Perkins v. Wright*, 3 Har. & M. (Md.) 324.

⁴ *King v. Hamilton*, 4 Pet. (U. S.) 311.

⁵ *Long v. Bowring*, 33 Beav. 585; *Costigan v. Hastler*, 1 Sch. & Lef. 166.

⁶ *Helling v. Lumley*, 3 DeG. & J. 493; *Evans v. Walshe*, 2 Sch. & Lef. 419; *Lowder v. Blackford*, Beat. 522; *Revell v. Hussey*, 2 Ball. & B. 280; *Law v. Treadwell*, 12 Me. 442.

tenant at the time of entering into the contract knew that the premises were badly out of repair, but by reason of secret defects did not know the extent of their non-repair, and he stipulated that certain specific repairs should be made, which was done, but afterwards it turned out that one of the walls of the building was so defective as to necessitate its being taken down and rebuilt, which would involve a large expense, it was held, that notwithstanding this, the contract must be enforced.

SEC. 188. *Illegal purposes.*—If the agreement contemplates a use of the premises for illegal purposes, it will not be enforced.¹ But the mere fact that it *savors* of illegality, is not enough. It must, in order to be outside the pale of equitable enforcement, be either legal or illegal,² and it may doubtless be regarded as the rule, *that, unless the agreement is so tainted with illegality, that, at law, the landlord could not recover the rent*, the contract will be enforced.

SEC. 189. *Want of authority by intended lessor.*—If the intended lessor had no authority to let the premises, the agreement cannot be enforced, as, if an agent enter into a contract to let premises for his principal, which he had no authority to make, or if a company or corporation enters into a contract in that respect which is *ultra vires*,³ or if a person enters into a contract to lease land to which he has no title, or to which his title is defective, ⁴or if a

¹ Cook v. Waugh, 2 Giff. 201.

² Bettsworth v. Dean, &c., Sel. Cas. Ch. 66, as the law will not give its aid to a party to consummate, an illegal or immoral purpose or one against public policy. Dumont v. Dufore, 27 Ind. 263; Dobson v. Swan, 2 W. Va. 511; Evans v. Kittrell, 33 Ala. 449; Parks v. McKaney, 3 Head (Tenn.) 297. In Cowan v. Milbourn, L. R. 2 Exchq. 230, the defendant agreed to let rooms to the plaintiff, but learning afterwards that they were to be used for lectures maintaining that the character of Christ is defective and his teaching misleading, he refused to allow the use of the rooms, but did not give this as

a reason for his refusal. In an action against him for a breach of the agreement it was held, that the purpose for which the plaintiff proposed to use the rooms was blasphemous and illegal, and that the defendant could avail himself thereof as a defence to the action, although he did not assign it as a reason for refusing to perform.

³ Aubin v. Holt, 2 Kay & J. 70.

⁴ Earl of Shrewsbury v. No. Staffordshire R. R. Co., L. R. 1 Eq. 593.

⁵ Buskurk v. Phillips, 6 Jur. N. S. 363, but if the lessee elects to take such title as the lessor has, he can do so. Woodbury v. Luddy, 14 Allen (Mass.) 263.

trustee enters into a contract to lease certain lands, and the execution of the agreement would involve a violation of his trust, the court will refuse to enforce it, but will leave the parties to their remedy at law ; ' and the same rule prevails where the performance of the contract is impossible, ' or where the lessor, if compelled to perform, is in danger of having his estate in the premises forfeited, as, where the lessor holds under a lease which forbids underletting and provides for a forfeiture for a breach of any of the covenants. '

SEC. 190. *Surprise, mistake, fraud.*—In order to secure the specific enforcement of a contract, it must be free from fraud, surprise and mistake, ' for where there is mistake there is not that consent which is essential to a contract in equity ; *non videntui qui errant consentire.* ' A mistake of law, however, is not sufficient to defeat this remedy, ' nor of the legal consequences of the contract. ' But, where

¹ Phillips v. Edward, 33 Beav. 440 ; Byron v. Acton, 1 Bro. P. C. 186 ; Haywood v. Cope, 25 Beav. 153 ; Hartnell v. Yielding, 2 Sch. & Lef. 549 ; Sneesby v. Thorne, 7 DeG. M. & G. 899.

² Green v. Smith, 1 Atk. 572.

³ Peacock v. Penson, 11 Beav. 355 ; Helling v. Lumley, 3 DeG. & J. 493.

⁴ Fry on Specific Performance, Sec. 475 ; Bradbury v. White, 4 Me. 891 ; Mitchell v. Nicholson, 8 Yerg. (Tenn.) 194 ; King v. Hamilton, 4 Pet. (U. S.) 311.

⁵ Dig. Litt. 50, tit. 17 t. 116.

⁶ Croombe v. Lediard, 2 My. & K. 251 ; Champlin v. Laytin, 18 Wend. (N. Y.) 409 ; Wintermute v. Snyder, 3 N. J. Eq. 489 ; Good v. Herr, 7 W. & S. (Penn.) 253. But see Greer v. Boone, 5 B. Mon. (Ky.) 554 ; Trigg v. Read, 5 Humph. (Tenn.) 529 ; Lowndes v. Chisholm, 2 McCord (S. C.) Ch. 255 ; Lamont v. Rowley, 6 Har. & J. (Md.) 500 ; where it is held that either a mistake of law or fact is sufficient.

⁷ Gt. Western R. R. Co. v. Crippen, 5 Hare, 91. The maxim *ignorantia legis excusat non*, though its operation is sometimes harsh, and productive of serious consequences to a party, is nevertheless

predicated upon the soundest principles of public policy and of morals. Aris. Nic. Eth. iii. 1 Pascal Lett. Provin. Let. 4, and for this reason courts of equity will neither set aside or refuse to enforce contracts upon this ground. Marshall v. Collett, 1 Y. & C. Exchq. 289 ; Cockerell v. Chalmeley, 1 R. & My. 418 ; Pullen v. Ready, 3 Atk. 587 ; Bilbie v. Lumley, 2 East, 469 ; Champlin v. Laytin, 18 Wend. (N. Y.) 409. See cases cited in previous note. " It is a dangerous plea," KENT, C. J., in Shotwell v. Murray, 1 John Ch. 512. The parties, therefore, will not be permitted to say that the legal result of their contract is different from what they expected or intended. Croombe v. Lediard, ante. Thus, where it was admitted that the effect of an agreement was to give an option to a lessee as to the duration of the term, but it was contended that this was not in the contemplation of the parties, the defense was overruled. Price v. Dyer, 17 Ves. 356. A different doctrine has been held in Kentucky, S. Carolina and Maryland. Exrs. v. Maryck, 1 Hill (S. C.) Ch. 257 ; Fitzgerald v. Peck, 4 Litt. (Ky.) 125 ; Lamont v. Rowley, ante.

there is a mistake of fact, as where the agreement applies to different premises than those which the defendant supposed they applied to, it is a good defence to a bill for specific performance,¹ but the burden is upon the defendant to make out the defence."

SEC. 191. *Contract will not be varied.*—The court will not, upon the application of a party, correct a mistake, and enforce a performance of the contract as corrected, unless the mistake is shown to be mutual, *and is clearly established*; but in the latter instance, our courts will correct a mutual mistake, and enforce the contract as corrected.² But in England a different rule prevails, and if the contract omits any material term or inaccurately expresses the real intention of the parties, the court will not enforce it with a variation to correct the mistake.³ But it must

¹ Austin v. Ewell, 25 Tex. 408.

² Western R. R. Co. v. Babcock, 6 Met. (Mass.) 346.

³ King v. Ashworth, 3 Iowa 452; Mosby v. Wall, 23 Miss. 81; Rogers v. Atkinson, 1 Ga. 12; Tilton v. Tilton, 9 N. H. 885; Coles v. Brown, 10 Paige (N. Y.) Ch. 535; Shelley v. Smith, 2 A. K. Mar. (Ky.) 504; Smith v. Allen, 1 N. J. Eq. 562; Rhode Island v. Massachusetts, 15 Pet. (U. S.) 233; Coot v. Craig, 2 H. & M. (Va.) 618; Chamberlain v. Thompson, 10 Conn. 243.

⁴ Fry on Specific Performance, Sec. 519, *et seq.*; Nurse v. Seymour, 13 Beav. 254; Rich v. Jackson, 2 Bro. C. C. 514; Davies v. Fitton, 2 Dru. & W. 255; Roberts v. Collins, 7 Ves. 130; Emmett v. Dewhurst, 3 My. & Cr. 587. Thus in Woolam v. Hearne, 7 Ves. 211, the plaintiff alleged an agreement by which the defendant was to grant him a lease of a certain house at £60 rent per annum; but the memorandum of the agreement, either by mistake or with a fraudulent purpose, stated the rent at £73 10s. The plaintiff sought to have the agreement corrected in this respect, and enforced as corrected. The court were satisfied that the plaintiff was right as to the mistake, but held that the evidence could not be used to procure

a decree. See also to same effect, Higginson v. Clowes, 15 Ves. 516; Winch v. Winchester, 1 V. & B. 375; Clinan v. Cooke, 1 Sch. & Lef. 22. In Brodie v. St. Paul, 1 Ves. Jr. 326, a party agreed to take a lease upon certain terms, which were read to him from a certain paper, *containing others which were not read*, but the court refused to admit parol evidence to prove which of the conditions had been read, and which had not. See also similar in effect, Lawson v. Laude, 1 Dick. 346; Marquis of Townsend v. Stangroom, 6 Ves. 328. The courts proceed upon the ground that the admission of such evidence would open the door to eluding the Statute of Frauds. Meres v. Ansell, 3 Wils. 275; Seago v. Deane, 4 Bing. 459; Sanderson v. Griffith, 5 B. & C. 900; Preston v. Merceau, 2 W. Bl. 1249. But it is held, that the defendant may avail himself of such a mistake in defence to a bill for specific performance. Squire v. Campbell, 1 My. & Cr. 480; London, &c., Co. v. Winter, Cr. & Ph. 57, and that the mistake may be corrected, and contract as corrected enforced, when the answer admits the mistake. Attorney-General v. Stilwell, 1 Y. & C. Exchq. 5. MR. FRY, in his work on Specific Performance, Sec. 519-34,

not be understood that a contract with a variation can *never* be enforced, because the restriction does not affect the case of a subsequent collateral agreement in writing, because if the variation be legally agreed for, it is a part of the agreement ; if not legally agreed for, it is no part of the agreement, and consequently no variation. The real meaning of the case is, that a *parol* agreement cannot be added to an agreement in writing, and the agreement *as amended* by parol enforced. But this rule is not inflexible, because if there has been such an actual part performance by the plaintiff of a parol variation, that it would be a fraud upon him to execute the written agreement without the parol variation, by analogy it would seem that parol evidence of such variation is admissible with a view to its being specifically performed.¹ Where an agreement in writing has been materially varied by parol, and the parol variation has been partly performed, it may be treated as a new parol agreement, and is not oboxious in equity, to the Statue of Frauds, because partly performed.²

SEC. 192. **Party will not be compelled to accept less than he contracted for—May elect to do so.**—A court of equity will never enforce an agreement, when the party seeking to enforce it cannot confer upon the defendant all that he contracted for, and all that the contract calls for. Thus, if the defendant has contracted for a term of ten years, he cannot be compelled to accept a lease for nine years,

ments severely upon this doctrine, and exposes its absurdity, but, nevertheless, says that the rule in the English courts is as stated. Ante. See also Woodfall's L. & T. 593, and cases cited. The reasons for the distinction taken between the situation of a plaintiff seeking the performance of a written contract *with* a parol variation, and of a defendant offering the variation in defence of the plaintiff's equity, are stated in Townsend v. Stangroom, 6 Ves. 328; Hosier v. Read, 9 Mod. 86; Flood v. Finlay, 2 Ball. & B. 9; Woollam v. Hearne, 7 Ves. 211; Clarke v. Grant, 14

Ves. 519; Garrard v. Grinling, 2 Swanst. 144; Davies v. Fitton, 2 Dru. & W. 225. But, as previously stated, these reasons have not generally been regarded as valid by our courts. Kisselbrack v. Livingston, 4 John. Ch. (N. Y.) 148, in which KENT, Ch. J., attacks the English doctrine. Also see Story's Eq. Juris., Sec. 161, in which that eminent jurist exposes its absurdity.

¹ Robson v. Collins, 7 Ves. 183; Rich v. Jackson, 4 Bro. C. C. 519.

² Anonymous 5 Vin. Abr. 522, pl. 38.

or if he has contracted for a term of sixteen years, he will not be compelled to accept a lease for six years, with compensation for the deficiency ;¹ nor, if he has contracted for a lease in possession, will he be compelled to accept one in reversion,² nor if he has contracted for the assignment of a lease, will he be compelled to accept the assignment of an under lease,³ and generally, a person can be compelled to accept only such a lease as he contracted for.⁴ But a party may elect to accept a lease different from that named in the contract, and, if he files a bill for the specific performance of the contract, the court will not decree it, unless he submits to such changes or compensation as the court, in view of the circumstances, thinks he ought to submit to,⁵ and, where the plaintiff in a bill for specific performance, alleges an agreement with parol variations *in favor* of the defendant, the court will decree performance even though the defendant sets up the statute in defence.⁶ Where the defendant relies on a parol variation of a written contract as a defence, he must prove such part performance of the agreement as altered, as would induce the court to enforce it as an original, independent agreement.⁷

SEC. 193. Where anything remains to be fixed or decided

¹ In the case last cited from Viner's Abr., W leased a house to N for eleven years, and agreed that £20 might be laid out on it in repairs, and the agreement was put in writing and signed and sealed by the parties. N repaired the house, and finding that it would take much more than £20 told W the facts, and that he would go on and lay out more money, if he would enlarge the term to twenty years, or add fourteen, or as many as N should think fit. W replied that they would not fall out about that; and afterwards said that he would enlarge the term, without mentioning any certain term, and, upon a question being raised whether this new agreement made by parol, which varied from the written agreement, should be carried into execution, notwithstanding the Statute of Frauds, the court held

that it was a new agreement, and *laying out the money* was a part performance of it, and should be carried into execution.

² Long v. Fletcher, 2 Eq. Cas. Abr. 5.

³ Lineham v. Cotter, 7 Ir. Eq. 176.

⁴ Darlington v. Hamilton, 1 Kay, 550; Madely v. Booth, 2 DeG. & S. 718; Beeston v. Stutley, 27 L. J. Ch. 156.

⁵ Browne v. Sligo, 10 Ir. Ch. 1; Barnard v. Cane, 26 Beav. 253; Jaynes v. Stotham, 8 Atk. 388; Painter v. Nimby, 11 Hare, 20; Hanbury v. Litchfield, 2 My. & K. 629; Cleaton v. Gower, Finch, 164.

⁶ Martin v. Pycroft, 2 DeG. M. & G. 785; Middleton v. Greenwood, 2 DeG. J. & S. 142.

⁷ Legal v. Miller, 2 Ves. 299; Price v. Dyer, 17 Ves. 356, 364; Robinson v. Page, 3 Russ. 121; Dart v. & P. 669.

by third persons.—If the amount of premium or rent to be paid, or any other material point, is by the agreement left to be determined by third persons, as by arbitrators or surveyors, and that has not been done before suit, the court will not decree specific performance, having no power to compel such third persons to perform their duty. It therefore treats the contract as too imperfect to be specially enforced.¹ But after such matter has been so determined the contract may be enforced by decree, even where the sum fixed appears to be exorbitant, no fraud, mistake or miscarriage being proved.² Thus B agreed to grant a lease to W as soon as W should have built a house with the necessary out-buildings on the land, of the value of 1,400*l.* at the least, “according to a plan to be submitted to and approved by B.” W agreed to build such house and take the lease; no plan was submitted to or approved by B, but he was ready and willing to approve of any reasonable plan; under such circumstances, a bill filed by B for a specific performance, was dismissed with costs.³

SEC. 194. When contract conditional on lessor's ability.—If a contract for a lease is made conditional on the lessor's ability to grant it, a bill for a specific performance cannot be supported without proof of the lessor's ability; or that he has received part of the agreed premium, and interest on the balance, and so in effect is estopped himself from relying on the condition.⁴ But the plaintiff may be entitled to an equitable lien on the land for the sums expended on the faith of the agreement, with interest thereon, and to consequential relief.⁵

SEC. 195. Where intended lessor has no sufficient title.—On the other hand, if a party agrees to let an estate, and

¹ Milnes v. Grey, 14 Ves. 450; Darby v. Whittaker, 4 Drew, 184; Tillett v. Charing Cross Bridge Co., 26 Beav. 419; Fry, ss. 215. See also Collins v. Collins, 28 L. J. Ch. 184; Jackson v. Jackson, 1 Sm. & Giff. 184.

² Collier v. Mason, 25 Beav. 200; Ormes v. Beadle, 2 Giff. 166;

Blackett v. Bates, 34 L. J. Ch. 515.

³ Brace v. Wehnert, 25 Beav. 348.

⁴ Abbott v. Blair, 8 W. R. 672. Bauman v. Matthews, 4 L. T. N. S. 788.

⁵ Middleton v. Magnay, 2 H & M. 233; 12 W. R. 706; Hindley v. Emery, L. R. 1 Eq. 52.

files a bill for the specific performance of the agreement, it will be dismissed with costs, if, in the course of the suit, it should appear that the intended lessor had a defective title; even though the objections, on which the refusal to take the lease was grounded, were frivolous and untenable.¹ Where the lessor's consent or license is necessary to an assignment of a lease, it is the vendor's duty to obtain it.² If he cannot do so before the commencement of a suit for a specific performance, he cannot maintain the suit,³ and, where it appears from the bill that the plaintiff is unable, from causes which he cannot control, to make a good title, the plaintiff cannot bring the cause to a hearing upon the mere chance that he may by that time be in a situation to sue the defendant.⁴

SEC. 196. Where the contract is uncertain.—If the contract is uncertain, that is, if it is impossible to say precisely what either party was to do, or whether he has done it, it cannot be specifically enforced. Thus, where an agreement for a lease provided that the defendant would take the house if put into thorough repair and the drawing-room was “handsomely decorated according to the present style,” the court held that it was too uncertain to be specifically enforced.⁵ But if the intended tenant takes possession under the agreement and brings a bill for specific performance, the court will decree performance, with an inquiry as to whether the condition has been performed.

SEC. 197. Common covenants.—The court will not decree the specific performance of common covenants, as husbandry covenants,⁶ or covenants to repair,⁷ except under peculiar circumstances,⁸ nor to lay out a certain

¹ *Bascomb v. Phillips*, 29 L. J. Ch. 380.

² *Long v. Bowring*, 10 Jur. N. S. 668.

³ *Birmingham v. Sheridan*, 33 L. J. Ch. 571; *Forrer v. Nash*, 11 Jur. N. S. 789.

⁴ *Reeves v. Greenwich Tanning Co.*, 2 H. & M. 54.

⁵ *Taylor v. Partington*, 7 DeG. M.

& G. 328; *Jeffrys v. Stephens*, 6 Jur. N. S. 947.

⁶ *Saunda v. Lawford*, 4 Giff. 42; *Faulkner v. Llewellyn*, 12 W. R. 193; *Norris v. Jackson*, 8 Giff. 396.

⁷ *Rayner v. Stone*, 2 Eden. 128.

⁸ *London v. Nash*, 1 Ves. Jr. 12.

⁹ *Backett v. Bates*, 2 H. & M. 270.

amount in buildings,¹ such covenants being regarded as too uncertain and indefinite for the court to carry them out.² The rule is that specific performance is decreed only where the plaintiff wants the time in specie, and cannot have it any other way.³

SEC. 198. Not of part of a contract.—*Exceptions.*—The court will not decree specific performance of part of a contract,⁴ unless the residue has been already performed,⁵ or the unperformed part is separable and divisible from the rest, and of itself forms a complete contract. Thus, where the owner of a plot of ground agreed to grant a lease of it to A as soon as the latter had erected a villa thereon; but it was stipulated that if A should not perform the agreement on his part, the agreement for a lease was to be void, and that the owner might re-enter: A was to insure in a particular way, and he was to have the option of purchasing the fee within two years, upon certain terms. A erected the villa, but insured in a wrong office and in a wrong name: it was held, that the contract for a lease was independent of the option to purchase, and that notwithstanding the forfeiture of the first, the latter still subsisted, and a specific performance of the contract for sale was decreed.⁶ In such a case the title must be produced and proved in the usual manner, in the absence of any express stipulation to the contrary.⁷ A tenant for years, with an option of purchasing the fee, must not only give due notice, but also on the proper day, pay or tender the purchase money; that being a condition precedent.⁸ Such a notice may

¹ *Moseley v. Virgin*, 191, 3 Ves. 184.

² See ante, Sec. 194.

³ *Paxton v. Newman*, 2 Sm. & Giff. 437; *Errington v. Aynesley*, 2 Dick. 692; *Lucas v. Commerford*, 3 Bro. C. C. 166.

⁴ Fry on Specific Performance, Chap. XV.; *Ogden v. Fossick*, 82 L. J. Ch. 73; *Scottish North-Eastern Railw. Co. v. Stewart*, 8 Macq. (Sc.) 382.

⁵ *Hope v. Hope*, 22 Beav. 351. The party seeking to enforce an agreement must show that he has

performed, or has offered to do so. *Thorp v. Pettit*, 16 N. J. Eq. 188; *Boone v. Iron Co.*, 17 How. (U. S.) 340; *Tyler v. McCurdle*, 17 Miss. 280; *Varnum v. Babcock*, 13 Iowa 194; *Satterfield v. Keller*, 14 La. An. 604; or show an excuse for his failure. *Goodell v. Field*, 14 Vt. 448; *White v. Yaw*, 7 id. 357.

⁶ *Green v. Low*, 22 Beav. 625.

⁷ *Welchman v. Spinks*, 5 L. T. N. S. 835.

⁸ *Weston v. Collins*, 11 Jur. N. S. 190; *Ld. Ranelagh v. Melton*, 2 Dr. & Sm. 278.

be given to the infant heir of the lessor, and will constitute a valid contract, which may be enforced in equity, notwithstanding the infant cannot give a discharge for the purchase money.¹

SEC. 199. *After unnecessary delay by plaintiff.*—Where one party to an agreement trifles or shows backwardness in performing his part of it, equity will not decree a specific performance in his favor, especially if the circumstances and situation of the other party are materially altered in the mean time.² As a general rule, a party cannot call upon a court of equity for this relief, unless he has shown himself ready, desirous, prompt and eager.³ Where there has been considerable unnecessary delay on the part of the plaintiff, specific performance will be refused,⁴ especially where the contract is in anywise unilateral.⁵ "It would be dangerous to permit parties to lie by, with a view to see whether the contract will prove a gaining or losing bargain, and, according to the result, either abandon it, or, considering time as having nothing to do with the matter, to claim a specific performance." But delay, even for a long period, may be excused, where the tenant has entered into possession, and paid rent under the agreement;⁶ or where, under the circumstances, a strict application of the rule would work injustice, the rule would be relaxed;⁷ or where the objection on the ground of delay has been waived;⁸ and, where a person is let into possession under

¹ Woods v. Hyde, 31 L. J. Ch. 295.

² Hayes v. Caryll, 1 Bro. P. C. 126; Norris v. Jackson, 1 J. & W. 819; Green v. Covilland, 10 Cal. 817; Ewing v. Beauchamp, 6 B. Mon. (Ky.) 422; Nelson v. Hager-town Bank, 27 Md. 51; Johnson v. Hopkins, 19 Iowa 49; Boston, &c., R. R. Co. v. Bartlett, 10 Gray (Mass.) 384; Pickering v. Pickering, 38 N. H. 400.

³ Milward v. Earl of Thanet, 5 Ves. 720, n.; 2 Tudor L. C. Eq. 443; (2d ed.).

⁴ Heaphy v. Hill, 2 Sim. & Stu. 29; Southcomb v. Bp. of Exeter, 6 Hare, 218, 218; Chesterman v.

Mann, 9 Hare, 206; Eads v. Williams, 4 DeG. M. & G. 691; Walters v. Northern Coal Mining Co., 5 DeG. M. & G. 629; Sneesby v. Thorne, 1 Jur. N. S. 1058.

⁵ Fry Specific Performance, 733.

⁶ Alley v. Deschamps, 13 Ves. 225; Ferth v. Greenwood, 1 Jur. N. S. 866.

⁷ Sharp v. Milligan, 22 Beav. 606; Carton v. Bury, 10 Ir. Ch. 387; Clarke v. Moore, 1 Jon. & L. 723.

⁸ Walker v. Jeffrys, 1 Hare, 353; Jones v. Jones, 12 Ves. 188.

⁹ King v. Wilson, 6 Beav. 124; Eubank v. Hampton, 1 Dana (Ky.) 343.

a contract, it is taken for granted that each party is satisfied, until one of them moves towards the complete execution of the contract.¹ But if a tenant, who has entered into possession under an agreement for a lease, has committed waste, or violated the covenants to be contained in the lease, the contract will be enforced upon his application, particularly if, under the lease, the lessor would be entitled to re-enter.² But, in order to prevent a decree in his favor, the breaches must be clearly and satisfactorily established,³ or the court will decree performance by the execution of an ante-dated lease and leave the landlord to proceed at law by ejectment.⁴ In the case of an agreement where the parties have expressly made time of the essence of the contract,⁵ or where, from the conduct of the parties,⁶ or from the fluctuating nature of the property, it is evident that the parties so intended, the court will regard time as of the essence of the contract, and will refuse to enforce it upon the application of a party who has been guilty of *laches* in that respect.⁷

SEC. 200. *Oral agreement partly performed*.—An action at law will not lie in favor of either party, upon an oral contract for a lease for a term exceeding that which by statute may be granted by parol⁸ which is some of the States in one year and in others three years. But a court of equity will decree a specific performance of such contracts, notwithstanding the Statute of Frauds, *when there*

¹ *Miller v. Bear*, 3 Paige Ch. (N. Y.) 486; *Scarlett v. Hunter*, 3 Jones Eq. (N. C.) 84; *Ashmore v. Evans*, 11 N. J. Eq. 151; *Haffner v. Dickson*, 2 H. & J. (Md.) 42.

² *Weatherall v. Geering*, 12 Ves. 504; *Nunn v. Truscott*, 3 DeG. & S. 304; *Hill v. Barclay*, 18 Ves. 63; *Lewis v. Bond*, 18 Beav. 85; *Nesbitt v. Meyer*, 1 Swanst. 223.

³ *Pain v. Coombs*, 8 Sm. & Giff. 449; *Blackett v. Bates*, 2 H. & M. 270.

⁴ *Lilley v. Leigh*, 3 DeG. & J. 204; *Poyntz v. Fortune*, 27 Beav. 393.

⁵ *Bomier v. Caldwell*, 8 Mich. 283; *Primm v. Barton*, 18 Tex. 206.

⁶ *Pennock v. Ela*, 41 N. H. 189; *Jones v. Robbins*, 29 Me. 351; *Younger v. Welch*, 23 Tex. 417; *Keller v. Fisher*, 7 Ind. 718; *Walton v. Wilson*, 30 Miss. 376; *Hoffman v. Hummer*, 17 N. J. Eq. 263.

⁷ *Macbryde v. Weekes*, Beav. 533; *Potter v. Tuttle*, 22 Conn. 512; *Steele v. Biggs*, 23 Ill. 643; *Baldwin v. Van Vorst*, 10 N. J. Eq. 577; *Daloret v. Rothschild*, 1 Sim. & Stu. 590; 2 *Tudor's Leading Cas. in Eq.* 453.

⁸ *Clarke v. Fuller*, 16 C. B. N. S. 24; *Kelly v. Webster*, 12 C. B. 282; *Savery v. Turnley*, 6 H. & N. 239.

*has been such a part performance of the agreement that, to refuse it would work a fraud upon the party seeking its specific execution.*¹ But in order to warrant the exercise of this power, the contract must be clearly established by proof, or be admitted by the pleadings,² and in a case where but one witness testified to part performance, and the agreement was denied by the answer, specific performance of a verbal agreement to convey lands was denied.³ But where there is but one witness, yet, *if his evidence is supported by collateral circumstances*, it will prevail against a denial of the agreement by the answer;⁴ but, where there is the testimony of only one witness and no corroboration thereof by collateral circumstances, and the agreement is positively and unqualifiedly denied by the answer, a specific performance of the agreement will not be decreed,⁵ and particular is this the case where the denial in the answer is in any measure sustained by collateral circumstances,⁶ and it must also clearly appear that the party seeking relief has partly performed such agreement.⁷

SEC. 201. **What constitutes part performance.**—Questions of this character frequently arise in contracts for the sale of lands, but may be said to be very unfrequent in the case of agreements for leases. As an invariable rule, it may be said that, *in order to amount to part performance, an act must have been done unequivocally referred to, and resulting from, the agreement, and such that an inference that some agreement existed would result from the very*

¹ *Dickerson v. Chrisman*, 28 Mo. 134; *Ham v. Goodrich*, 33 N. H. 32; *Fitzgerald, &c. v. Britt*, 43 Iowa 498; *Goose v. Jones*, 73 Ill. 508; *Temple v. Johnson*, 71 Ill. 13; *Reese v. Reese*, 41 Md. 554; *Smith v. Crandall*, 20 Md. 482; *Aday v. Echals*, 18 Ala. 353; *Eyre v. Eyre*, 19 N. J. Eq. 102; *Arquello v. Edinger*, 10 Cal. 150; *Johnston v. Johnston*, 6 Watts. (Penn.) 370; *Steel v. Payne*, 42 Ga. 207.

² *Mortal v. Lyons*, 8 Ir. Ch. 112; *Morphett v. Jones*, 1 Swanst. 172; *Eyre v. Eyre*, ante; *Smith v. Crandall*, 20 Md. 482; *Wallace v.*

Brown, 10 N. J. Eq. 308; *Bunton v. Smith*, 40 N. H. 352; *Wilkinson v. Wilkinson*, 1 Dessau (S. C.) 201.

³ *Broughton v. Coffen*, 18 Gratt. (Va.) 184.

⁴ *Pilling v. Armitage*, 12 Ves. 80; *Toole v. Medlicott*, 1 Ball. & B. 393.

⁵ *Morphett v. Jones*, 1 Swanst. 172; *Lindsay v. Lynch*, 2 Sch. & Lef. 1.

⁶ *Id.*

⁷ *Broughton v. Coffen*, ante; *Nunn v. Fabian*, 35 L. J. Ch. 141.

fact that the act was done,' and then parol evidence is admissible to show what the agreement is.' Delivery of the possession of the premises by the landlord, and taking possession thereof by the tenant, and payment of rent, has been held sufficient;' so an entry and expenditure of considerable sums in repairs or improvements, with the acquiescence of the landlord, is treated as part performance within the rule.' But mere possession by the ten-

¹ *Frame v. Dawson*, 14 Ves. 327; *ex parte Hooper*, 19 id. 479; *Morphett v. Jones*, 1 Swanst. 181. *The acts must be such as could have been done with no other view or design than to perform the agreement, and not such as are merely introductory or ancillary to it.* *Gunter v. Hulsey*, Amb. 586. The act must unequivocally refer to, and result from, the agreement. *Mohana v. Blunt*, 20 Iowa 142; *Rosenthal v. Freehanger*, 26 Md. 75. And they must not only be referable to, but consistent with, the contract. *Tompkinson v. Straight*, 17 C. B. 697; *Nunn v. Fabian*, L. R. 1 Ch. Ap. 441; *Powell v. Lovegrove*, 8 DeG. M. & G. 857; *Price v. Salusbury*, 32 Beav. 446; *Faulkner v. Llewellyn*, 31 L. J. Ch. 549.

² See note to Sec. 201, *supra*.

³ In *Kine v. Balfe*, 2 Fall & B. 843, where a landlord sought specific performance of a parol contract for a lease, against a tenant who had entered and paid rent under it, LORD MANNERS said; "How is it possible to refer this possession to any other title but this agreement, and what is the situation in which this plaintiff is placed by the conduct of the defendant? The defendant could at any time enforce this agreement against the plaintiff; he would be protected in this court against an ejectment, and from being treated as a trespasser; and the plaintiff was by the contract and the acts of the defendant, disabled from dealing with any one else for the land." See also, *Bowens v. Cator*, 4 Ves. 91; *Boardman v. Mastry*, 6 id. 470; *Wills v. Stradling*, 6 id. 881; *Pain v. Coombs*, 4 DeG. & J. 84.

⁴ *Shillibeer v. Jarvis*, 8 DeG. M. & G. 79; *Dunn v. Spurrier*, 7 Ves. 231. In order to bring a case within

the exemption upon this ground, it is not necessary that the landlord should have actively promoted the lessee's expenditures or improvements. It is enough if he *knew* of them and passively encouraged him in making them under an erroneous impression that he had title under the contract, when the lessor must have known that the lessee would not have made them except upon an expectation that no objection would be thrown in the way of his enjoyment of them, and under such circumstances a specific performance will be decreed. *Dunn v. Spurrier*, 7 Ves. 231; *Seagood v. Meale*, Prec. Chan. 561; *Marshall v. Queenborough*, 1 Sim. & S. 520; *Smith v. Turner*, Prec. Chan. 561; *Lester v. Foxcraft*, Calles P. C. 108; *Gregory v. Mighell*, 18 Ves. 328; *Whitchurch v. Beris*, 2 Bro. C. C. 565, and merely "looking on," is generally as strong a circumstance as active encouragement if the tenant acted upon it. *Dunn v. Spurrier*, ante. In *Sutherland v. Briggs*, 1 Hare, 26, the plaintiff was the lessee of a house and some cottages adjoining for a term of thirty-one years, at a rent of 60*l.*, and was under a covenant to take down two of the cottages, and build a house upon the site, with suitable offices. He was also tenant from year to year of an adjoining meadow, belonging to a different proprietor, at a rent of 9*l.* The lessor of the house became the purchaser of the meadow, and a treaty proceeded between him and the plaintiff with regard to certain proposed repairs and alterations in the house, in consequence of which, the house was made to project over the meadow, part of which was attached to the demised premises, the costs and expenses far ex-

ant, standing alone, is not sufficient, because his possession may be referred to the implied tenancy arising from

ceeding the sum he had originally covenanted to lay out, being paid by the plaintiff and lessor in nearly equal moieties. The following memorandum was then drawn up by lessor, and signed by the plaintiff:—"Mr. Frampton having advanced me the sum of 850*l.* towards the additions and improvements lately made by me to the house and premises at Hayes in my occupation, in addition to 150*l.* previously allowed me for rebuilding the adjoining cottage, it is agreed that the rent of 69*l.* now paid for the house, &c., and field, shall be increased to 80*l.* a year, clear of all deductions whatsoever, commencing from Christmas last, dated the 8d day of February, 1836.—A. Sutherland." An ejectment for the meadow having been brought against the plaintiff, he filed his bill, praying a declaration by the court that he was entitled to the tenancy and occupation of it for the residue of the term of thirty-one years which he had in the house, and for an injunction; and it was decreed accordingly. The Vice Chancellor observed, that if the act of extending the house, in which the tenant had an interest for a term of years, into the meadow, with the landlord's consent, was not evidence of a contract between them, he knew not what act on the part of a tenant in possession of property could possibly be so considered; and he held that, notwithstanding the memorandum of the 8d of February, 1836, did not mention the term during which the plaintiff was to hold the meadow, yet enough was proved to support the allegation in the bill, that the time for which he was to hold it was to be commensurate with his lease of the house; and that the reservation of one entire rent of 80*l.* for the whole and every part of the consolidated property was sufficient to determine the question, and show that the whole was to endure for the same period; and he further held, that the justice of the case would not be satisfied by giving to the plaintiff so much of the meadow

as the house stood upon, as the act of building part of the house upon it was an act affecting the whole tenement, namely, the meadow, and not that part of it only on which the house stood. It is almost needless to observe, that if no expense be incurred by the lessee, a bare promise of a lease, being in direct contravention of the statute, cannot be enforced. *Seagood v. Meale*, Prec. Ch. 561; *Smith v. Turner*, cited, Prec. Ch. 561. Although courts of equity are disposed to go every possible length to assist a party in obtaining reimbursement of expenditure upon another's property, of the benefit of which he may have been deprived by the exercise of a legal right, as by the determination of a tenancy from year to year, yet there is no case in which a lessee, either of a term, or from year to year making any improvement upon the estate in his possession, though which the complete knowledge of the landlord, has been held entitled, as against that landlord, to have his lease prolonged until he shall obtain reimbursement for the improvements he has made; for he has a title of which he knows the duration. He is not under a mistake with regard to the nature of his title. He may perhaps be guilty of great imprudence, if the expectation that his lease will be renewed, or his possession from year to year continued, prove unfounded, but the failure of his expectations gives him no right either to a new lease or the renewal of an old one. *Pilling v. Armitage*, 12 Ves. 85. But if the landlord enters into an arrangement with a tenant for improvements, and sanctions them as an advance by the tenant upon a future term, equity will compel him to keep faith with the tenant, *Pilling v. Armitage*, ante. And it seems that, even though no specific agreement had been made, one would be implied in his favor until he had had the fair benefit of his improvements. *Sutherland v. Briggs*, ante. The effect of acquiescence on the part of the landlord is well

an entry by the landlord's permission,¹ nor does the expenditure of money upon a farm in the ordinary course of husbandry, amount to part performance, because it is referable to his implied tenancy,² nor does mere possession retained by a tenant after the expiration of a former lease, amount to part performance of a parol agreement made by the landlord to renew;³ but if the agreement is based upon an increased rent,⁴ or if the tenant goes on and makes extensive improvements that are inconsistent with the old relation, the rule is otherwise.⁵ And so generally, possession and special expenditures by the tenant on the faith of a parol agreement to grant a lease for a

illustrated by a Connecticut case, which, although, not involving a discussion of the question of part performance, yet shows that the landlord cannot tacitly permit the tenant to make large outlays for a certain purpose and then seek to prevent him from availing himself thereof. *Malley v. Thalheimer*, 44 Conn. 41. In this case a B had a power of attorney to lease the plaintiff's real estate, collect rents and institute all necessary legal proceedings that he should think necessary. Under this power he had the care of a certain premises leased by the plaintiff to the defendant, the lease limiting the use to the keeping of a lager beer saloon, and the lessee covenanting to use the premises for no other purpose. During the term the defendant, at a considerable expense, built a small kitchen in the rear and fitted up a restaurant on the premises. B knew of these facts and made no objections until two months after the alterations were completed. He then brought a bill for an injunction against the use of the premises for a restaurant. The court held, that inasmuch as, if the plaintiff personally had known of these facts, he would have been estopped, he was estopped by the knowledge of B from objecting to the new use.

¹ *Wills v. Stradling*, 8 Ves. 378; *Morphett v. Jones*, 1 Swanst. 181. But where the entry is distinctly referable to the agreement, *Aylesford's Case*, 2 Stra. 788; *Atwood v. Barham*, 2 Russ. 136; *Lacon v.*

Mertins, 8 Atk. 4; *Boardman v. Mastyn*, 6 Ves. 470; *Morphett v. Jones*, 1 Wils. 100; *Gregory v. Mighell*, 18 Ves. 838, it has been held sufficient, and delivery of possession on the one hand and taking it upon the other is a certainly strong and marked circumstance to take a case out of the statute, *Wills v. Stradling*, 8 Ves. 378, because the tenant is protected from liability as a trespasser, and the landlord disabled thereby from dealing with any other person in reference to the land. *Kine v. Balfe*, 2 Ball & B. 348. But in no case will possession itself be enough, *unless taken under the contract and with a view to its part performance*, *Cole v. White*, cited, 1 Bro. C. C. 409; *O'Rourke v. Percival*, 2 Ball & B. 63; *Bairdes v. Amhurst*, Prec. Ch. 402, and merely introductory or ancillary acts, though attended with expense, are not sufficient. *Whitbread v. Brockhurst*, 1 Bro. C. C. 412; *Frame v. Dawson*, 14 Ves. 886; *O'Reiley v. Thompson*, 2 Cox, 271; *Lindsay v. Lynch*, 2 Sch. & Lef. 1.

² *Brennan v. Bolton*, 2 Dru. & W. 349.

³ Because in such a case, his possession may be referable to the old lease, and does not unequivocally refer to and result from the agreement. *Mohana v. Blunt*, 20 Iowa, 142; *Rosenthal v. Freeburgher*, 26 Md. 75.

⁴ *Nunn v. Fabian*, L. R. 1 Ch. App. 85; *Wills v. Stradling*, ante.

⁵ *Spalding v. Couzelman*, 30 Mo. 177.

term, are sufficient to entitle him to a specific performance of the agreement, although the landlord denies the agreement,¹ as, where the tenant enters upon land and clears it up and improves it to an extent exceeding the value of the yearly rent,² or if he enters and builds or causes expensive alterations to be made. Thus, where a tenant under a parol agreement to execute a lease of an unfinished house for ten years, the tenant to complete the house at his own expense, and the tenant entered and completed the house and paid rent for some time, an execution of the lease was decreed by the court.³ The ground upon which the court proceeds in these cases is, that after such acts have been done, or expenses incurred, it would be fraudulent and inequitable for the landlord to withhold a lease.⁴ But where the acts done by the tenant are of an ordinary character, and such as are incident to an ordinary tenancy, they are referred to that rather than to the agreement. Yet the English courts have gone farther in this direction than our own, and are not entirely harmonious, although both profess to be governed by the same general rule. In at least one English case,⁵ it has been held that, possession of a tenant after the expiration of his term under an agreement for a renewal lease is a sufficient part performance of the agreement; while the American cases hold that such retention of possession is referable to the old tenancy, and affords no ground for the specific performance of an agreement to renew.⁶ In an English case,⁷ something more than a retention of possession under such an agreement seemed to be held necessary, but, where the landlord verbally agreed, before the old term expired, to grant the

¹ Farrello v. Davenport, 3 Giff. 363.

² Morrison v. Peav, 21 Ark. 110.

³ Farley v. Stokes, 1 Pars. Sel. Cas. (Penn.) 422; Surcome v. Peninger, 3 DeG. M. & G. 571; Savage v. Foster, 5 Vin. Abr. 524, pl. 43; Toole v. Medicott, 1 Ball & B. 393; Wills v. Stradling, 3 Ves. 378; Mundy v. Joliffe, 5 My. & Cr. 167; Sutherland v. Briggs, 1 Hare, 26.

⁴ Lindsay v. Lynch, 2 Sch. & Lef. 1; Frame v. Dawson, 14 Ves. 386.

⁵ Dowell v. Dew, 1 Yo. & Call 345.

⁶ Mohana v. Blunt, 20 Iowa 142; Rosenthal v. Freeburgher, 26 Md. 75.

⁷ Fabian v. Nunn, L. R. 1 Ch. Ap. 35.

tenant a renewal term of twenty-one years *at an increased rent*, but died before the lease was made, and the tenant remained in possession *and paid one quarter's rent at such increased rate*, it was held such a part performance as entitled him to a specific performance of the contract. In another English case, where an agreement in writing for a three years' tenancy reserved to the tenant the option of requiring a twenty-one years' lease at the expiration of the prior term, the Vice Chancellor appears to have considered that the tenant's verbal notice of an intention to take the new lease, accompanied by retention of possession, was binding upon him.¹ The possession of a stranger under an express or implied agreement for a lease, is a sufficient part performance thereof.² But the court will not decree a specific performance, although possession has been taken, unless the terms of the contract are clearly proved;³ nor if any of the terms are uncertain.⁴ The doctrine of part performance of a parol agreement is not to be extended by the court, and it is inapplicable in a case where a trustee has a power to lease at the request, in writing, of a married woman, which has not been made.⁵ After an offer had been made by a plaintiff to take a lease of a farm from the defendant, a draft was prepared by the defendant's solicitors, and approved of by the plaintiff with some alterations, and was afterwards altered by the defendant himself, and left by him with his solicitors, for the purpose of its being ascertained whether the plaintiff would agree to the alterations. On their submitting it to him he agreed to the alterations, but no agreement was signed. A part of the terms were, that the plaintiff should make certain repairs before the lease was granted. The plaintiff was put into possession by the direction of the defendant's solicitors, and made some repairs:—

¹ Beatson v. Nicholson, 6 Jur. 620.

² Gregory v. Mighell, 18 Ves. 328; Pain v. Coombs, 3 Sm. & Giff. 449.

³ Mortal v. Lyons, 8 Ir. Ch. R. 112.

⁴ Reynolds v. Waring, 1 You. 346; Price v. Assheton, 1 Y. & C. 441.

⁵ Phillips v. Edwards, 38 Beav. 440.

held, that although the plaintiff might have been let into possession without authority from the defendant, there was a sufficient part performance to take the case out of the Statute of Frauds, and a specific performance was decreed.¹ A agreed to grant to B a lease of a public-house, if he could obtain a retail licence to sell spirits in it. B entered into possession of the premises, and a licence was afterwards obtained, but only on the verbal undertaking of B, that "no excisable liquors should be sold for consumption on the premises." B refused to execute the lease when tendered to him: and it was held, that a bill by A for specific performance of the agreement must be dismissed, but under the circumstances without costs and without prejudice to proceedings at law.² Where the plaintiff and the defendant entered into an agreement, that when a certain house belonging to the plaintiff should be completed and finished fit for habitation, the plaintiff would grant to the defendant a lease thereof for twenty-one years, and the defendant took possession before the house was finished and occupied it for a year, but refused to pay rent or execute the lease until the house was completed and finished fit for habitation; upon a bill brought for specific performance it was refused with costs.³ In all cases, in order to secure the specific enforcement of an oral contract, it must be of such a nature, so definite and certain in all essential details, that, if in writing, the court would decree its performance.⁴

SEC. 202. Parties plaintiff in actions for.—Defendants.—The lessor, or his representatives in interest, or the lessee, or his representatives in interest, are the proper persons to bring an action for the specific performance of an agreement for a lease. In the case of a tenant for life, both he and the contingent remainder-man in fee may represent the inheritance in a bill for specific performance, though

¹ *Shillibeer v. Jarvis*, 8 DeGex. M. & G. 79.

² *Modlen v. Snowball*, 29 Beav. 641.

³ *Faulkner v. Llewellyn*, 31 L. J. Ch. 549.

⁴ *Thynne v. Glengall*, 2 H. L. Cas. 158.

their interests are merely equitable, provided the issue of the remainder-man will take, if he fails to do so by reason of the contingency,⁴ and, if there are no intervening equities controlling the case, specific performance will be decreed in favor of all claiming under them, in a case where it would be decreed between the original parties;⁵ and an assignee of the contract need not join the assignor as a party plaintiff with him.⁶ Executors or administrators of the intended lessee or lessor, as the case may be, may be either parties plaintiff or defendant to such proceedings,⁷ or the heirs of the deceased, where the legal estate vests in them.⁸ An infant may maintain a bill for specific performance of a contract made for him,⁹ but cannot be made a party defendant to such a suit.¹⁰ A *feme covert* may bind her separate estate, but not herself personally, by a contract for a lease. She may bring an action for specific performance when the statute gives her authority to sue or be sued, and she may be compelled to perform when she is given by statute full control over her separate estate.¹ A lunatic may be compelled to perform a contract for a lease if it was made during a lucid interval.² But an agreement to execute a lease to one who has committed a felony, will not be enforced.³ When premises are leased by one partner for the use of the firm, the partner in whose name the lease is taken, cannot take a renewal thereof for his own individual benefit and if renewed, the renewal will inure to the benefit of the firm.⁴ So if an employee of a firm, knowing that

⁴ *Sohier v. Williams*, 1 Curt. (U. S. C. C.) 479.

⁵ *McMorris v. Crawford*, 15 Ala. 271.

⁶ *Miller v. Whittier*, 32 Me. 203; *Colerick v. Hooper*, 3 Ind. 316.

⁷ *Phillips v. Everard*, 5 Sim. 192; *Page v. Broom*, 3 Beav. 36; *Collins v. Vandever*, 1 Iowa, 593.

⁸ *House v. Dexter*, 9 Mich. 246; *Buck v. Buck*, 11 Paige Ch. (N. Y.) 170. Or the devisees and the heirs may be compelled to convey. *Jacobs v. Locke*, 2 Ired. (N. C.) Eq. 283.

⁹ *Van Dyne v. Vreeland*, 11 N. J. Eq. 370; *Guard v. Bradley*, 7

Ind. 600. But *contra*, and holding that an infant can neither sue or be sued for specific performance, see *Flight v. Bolland*, 4 Russ. 298; *Haggart v. Scott*, 1 Russ. & My. 293.

¹⁰ *Flight v. Bolland*, ante.

¹ *Murray v. Barbe*, My. & K. 209; *Gaston v. Frankvorn*, 2 DeG. & S. 561.

² *Fry on Specific Performance*, Sec. 161.

³ *Willingham v. Jayer*, 3 Ves. 169.

⁴ *Mitchell v. Read*, 84 N. Y. 555; *Moody v. Matthews*, 7 Ves. 185.

a lease of the premises occupied by the firm is about to expire, secretly obtains a lease of the premises in his own name, a court of equity will enjoin him from interfering with the possession of the firm. Thus in a California case,^{*} an employee of a firm, whose lease was about to expire, obtained a lease of the premises with a view to carry on the same business. It was held that he should be enjoined from interfering with the possession of the employer. The court said: "We understand it to be the duty of the employee to devote his entire acts, so far as his acts may affect the business of his employer, to the interests and service of the employer; that he can engage in no business detrimental to the business of the employer; and that he should in no case be permitted to do for his own benefit that which would have the effect of destroying the business to sustain and carry on which his services have been secured. An agent should not, any more than a trustee, adopt a course that will operate as an inducement to postpone the principal's interest to his own. An agent or subagent who uses the information he has obtained in the course of his agency as a means of buying for himself, will be compelled to convey to the principal." It may be said that Andrew was not the agent of plaintiffs so far as concerns the obtaining a renewal of the lease; that he was not charged with the duty of obtaining a renewal. It must however be said that he was, by virtue of his employment, charged with the duty of furthering their interests, and with the duty of not using the information obtained by him as their employee to their detriment. It seems to us that if Andrew desired to engage in the same business as his employers, on his own account, a very plain and very proper course was open to him, namely, to state to them all the facts, and ask them to determine whether they desired a renewal. By pursuing the course which he did, he gave to Hopkins an inducement not only not to give plaintiffs a renewal at a decreased rental, but also an inducement not to renew at the then rental; and he com-

^{*} Gower v. Andrew, 18 Rep. 43.

^{*} 1 Lead. Cas. in Eq. 91.

pelled plaintiffs to have an unknown competitor who based his action upon knowledge acquired by him while in their employ. We do not think that this is equity or good conscience."

CHAPTER XXV.

LEASES.

- SEC. 203. What are, and of what may be made.
- SEC. 204. Reversion in lessor.
- SEC. 205. Essential requisites of a lease.
- SEC. 206. Operative words—Description of premises.
- SEC. 207. The Premises.
- SEC. 208. What passes as an incident of the property.
- SEC. 209. Appurtenances.—What pass as.
- SEC. 210. Formalities required in the several States.
- SEC. 211. Leases not affected by Statute of Frauds.
- SEC. 212. Leases by deed.—What are.
- SEC. 213. Seal.
- SEC. 214. Signing.
- SEC. 215. Attestation.
- SEC. 216. Delivery.
- SEC. 217. Escrow.
- SEC. 218. Recording.—Acknowledgment.
- SEC. 219. Date.
- SEC. 220. Entry of lessee.
- SEC. 221. Void or voidable leases.
- SEC. 222. What acts of the parties invalidate a lease. Alterations, erasures, interlineations, filling blanks, &c.
- SEC. 223. License.—Distinction between, and a lease.
- SEC. 224. Leases in reversion.—Inter esse termini.
- SEC. 225. Inter esse termini.
- SEC. 226. Void or voidable.
- SEC. 227. What avoids a lease.
- SEC. 228. Concurrent leases.
- SEC. 229. Estoppel.—Leases by.
- SEC. 230. After purchase of estate.
- SEC. 231. Effect of estoppel on the lessor.

SEC. 232. Effect of estoppel on the lessee.

SEC. 233. Construction.—Leases by deed.

SEC. 234. Parol evidence inadmissible to vary deeds.

SEC. 235. Exceptions.

SEC. 203. *What are, and of what may be made.*—A lease is a contract by which one person divests himself of, and another takes the possession of lands or chattels for a term, whether long or short¹ or definite or indefinite. Thus if a lease is given so long as the partnership between the tenants, continues, the lease expires when the firm ceases to exist, without any notice to quit.² It may be made to commence either from a time past, at the date thereof, or from a future day,³ and may relate exclusive-

¹ Addison on Contracts, 394; Bacon's Abr. tit. Leases, (K.); Reg v. Morrish, 32 L. J. M. C. 245. In Wells v. Sheerer, 78 Ala. 142, A writing under seal attested and recorded, in these words: "Know all men by these presents, that I do put into the hands of A. J. W., as collateral security for my board with him for the last three years and a half, my house and lot in the town of M.; and he is further authorized to control and receive the rents and profits, if there be any, until the war is over, and some of her children comes and sees to the payment of the above board, unless it should be sooner paid. If the said A. J. W. should receive any rents or profits for the house and lot, he is to give me credit with the amount on my account with him for board; and he will also give me credit with the amount of sale-bill bought at Mrs. W.'s sale, amounting to \$672," operates in the nature of a lease, and was so regarded in this case. In Walters v. Meyer, 89 Ark. 560, A and B executed a written agreement by which A sold to B a tract of land for \$10,000, payable in five annual installments of \$2,000 each, the first due the first day of January, 1879; B stipulating to pay \$1,000 rent for 1876, and if the installment due the first day of January, 1879, was paid, then the rent for 1879 should be \$800, and to continue at the same rates until

all the installments should be paid; "or, in other words, for every \$100 paid on the purchase price the rent to be reduced \$10;" and the residue remaining unpaid at the end of five years to bear interest at ten per cent. per annum; and when all was paid, A was to make title to B for the land. In an action by attachment on the crop for the rent of 1880, *Held*: That the contract was a bond for title, and not a lease. The parties were vendor and purchaser, and not landlord and tenant, and the stipulation for rent was manifestly an agreement for interest.

² Russell v. McCartney, 21 Mo. App. 8.

³ Addison on Contracts, p. 389; 2 Platt on Leases, 50; Enys v. Dannethorne, 2 Burr. 1,190. By the common law, livery of seizin, or an actual possession of the land, was essential to the completion of all grants for life or of inheritance, but not for mere chattle interests, as estates for years, or less than for life. But this distinction does not exist generally in the States of this country, the common law rule having been abrogated by statute or custom, and the estate vests upon the delivery of the deed or lease, but possession does not vest until actual entry; but the right of possession vests upon delivery of the instrument creating the estate, unless the possession, by the instrument, is to commence at a future

ly to real estate, or exclusively to chattels;¹ or it may relate to both, as in the case of a mill and machinery, or of a dwelling-house and the furniture,² or a farm and the

day, in which case the right attaches when the day arrives, or if dependent upon a contingency, when the contingency occurs; and if no definite time for the commencement of the tenancy is fixed, it will commence when the occupancy begins. Co. Litt. 46 a; Church v. Gilman, 15 Wend. (N. Y.) 656. In Kemp v. Derritt, 8 Camp. 510, the defendant took certain premises under an agreement that "the tenant is always to be subject to quit at three months' notice." The Court held that this created a quarterly tenancy, which might be determined by a three months' notice to quit, *expiring at the same time of the year it commenced*, or any corresponding quarter day, and that where the tenant, under such an agreement, enters at the middle of one of the usual quarters, *if there appears to be no agreement to the contrary, he will be presumed to hold from the day he enters*, and the tenancy can be determined only by a notice expiring that day of the year, or some other quarter day calculated from thence. This is essentially the case as to parol leases, as no interest exists until the lessee has actually entered into possession, because they are regarded as opposed to the spirit, if not the letter of the Statute of Frauds, especially in some of the States. When the tenant has not entered under a parol lease, it is held that the landlord's only remedy is upon the lease or agreement, and an action for use and occupation does not lie. The landlord may put an end to the lease in such a case by entry, or he may let the premises lie idle and recover the agreed rent. Tully v. Dunn, 42 Ala. 262. But in Indiana it is held that a lease by parol for a term not exceeding one year is valid within the Statute of Frauds, as well before as after entry, and that the lessee may recover possession according to the terms of the lease. Huffman v. Starks, 31 Ind. 474. And a similar doctrine prevails in New Jersey,

where the statute 29 Car. 2, Chap. 8, Sec. 1, is adopted as to parol leases for three years, where the rent reserved amounts to two-thirds the improved value of the thing demised. Birkhead v. Commins, 33 N. J. L. 44.

¹ Fawcett's L. & T. 1, 2.

² Smith v. Marrable, 10 M. & W. In Ward v. Macaulay, 1 T. R. 480, not only was the validity of leases of chattels recognized, but it was also established that the tenant took such an estate therein during the existence of the lease as deprives the lessor of all control thereover during such period, and as destroys his right of action for an injury done thereto, or the wrongful taking thereof by a third person during the term, *because his right of possession is suspended so long as the term continues under the lease*. In this case the plaintiff was the landlord of a house which he let ready furnished to Lord Montfort. An execution was issued against Lord Montfort, and the furniture belonging to the landlord was taken thereon by the sheriff. The landlord was held not entitled to recover in trespass for the goods against the sheriff, although the sheriff had notice that the furniture was his before he seized it. LORD KENYON Ch. J., said that the plaintiff's remedy was in trover. But, in a later case, Gordon v. Harper, 7 T. R. 9, where a similar state of facts existed, LORD KENYON recalled his *dicta* in the previous case, and for the same reason that, in the previous case he had held that trespass would not lie, held that *trover* would not lie in this. He said: "The only point for the consideration of the court in the case of Ward v. Macaulay was, whether in a case like the present the landlord could maintain an action of *trespass* against the sheriff for seizing goods, let with a house, under an execution against the tenant; and it was properly decided that no such action could be maintained. What was said further by me in that case, that

stock thereon.¹ At the common law, not only real estate,

trover was the proper remedy, was an extra-judicial opinion, *to which, upon further consideration, I cannot subscribe.* The true question is, whether, when a person has leased goods in a house to another for a certain time, whereby he parts with the right of possession during the term to the tenant, and has only a reversionary interest, he can, notwithstanding, recover the value of the whole property pending the existence of the term in an action of trover. The very statement of the proposition affords an answer to it. If, instead of the household goods, the goods here taken had been machines used in manufacture which had been leased to a tenant, no doubt could have been made but that the sheriff might have seized them under an execution against the tenant, and the creditor would have been entitled to the beneficial use of the property during the term: the difference of the goods then cannot vary the law. The cases which have been put at the bar do not apply; the one on which the greatest stress was laid, was that of a tenant for years of land whereon timber is cut down, in which case it was truly said, that the owner of the inheritance might maintain trover for such timber, notwithstanding the lease. But it must be remembered, that the only right of the tenant is to the shade of the tree when growing, and by the very act of felling it, his right is absolutely determined: and even then the property does not vest in his immediate landlord: for if he has only an estate for life, it will go over to the owner of the inheritance. Here, however, the tenant's right of possession during the term cannot be divested by any wrongful act, nor can it thereby be re-vested in the landlord. I forbear to deliver any opinion as to what remedy the landlord has in this case, not being at present called upon so to do: but it is clear that he cannot maintain trover." ASHUR, J., said: "I have always understood the rule of law to be, in order to maintain trover the plaintiff must have a right of

property in the thing and a right of possession, and that unless both these rights concur the action will not lie. Now, here it is admitted that the tenant had the right of possession during the continuance of his term, and consequently one of the requisites is wanting to the landlord's right of action. It is true that in the present case it is not very probable that the furniture can be of any use to any other than the actual tenant of the premises; but supposing the things leased had been manufacturing engines, there is no reason why a creditor seizing them under an execution should not avail himself of the beneficial use of them during the term."

"After such time as leases for years began to be looked upon as fixed and permanent interests," says BACON, 4 Bac. Abr. tit. Leases, (A.) "and that the leases were sufficiently provided to defend themselves and their possessions against the acts and encroachments, as well of the lessor as of strangers, men found it their interest to improve and encourage this sort of property, and therefore extended it to all sorts of interests and possessions whatsoever, being led thereto by that known rule, that whatsoever may be granted or parted with forever, may be granted or parted with for a time; and therefore not only lands and houses have been let for years, but also goods and chattels, though the interest of the lessee therein differs from the interest he hath in lands or houses so let for years: for if one lease for years a stock of live cattle, such lease is good, and the lessee hath only the use and profits of them during the term; but yet the lessor hath not any reversion in them to grant over to another, either during the term or after, till the lessee hath redelivered them to him, as he would have of lands in case of such lease for years, for the lessor hath only a possibility of property in case they all outlive the term; for if any of them die during the term, the lessor cannot have them again after the term; and during the

but chattels and hereditaments, corporeal or incorporeal, where the subject of lease,¹ including advowsons,

term he hath nothing to do with them, and, consequently, of such as die, the property rests absolutely in the lessee: so whether they live or die, yet all the young ones coming of them, as lambs, calves, &c., belong absolutely to the lessee as profits arising and severed from the principal, since otherwise the lessee would pay his rent for nothing; and therefore this differs from a lease of other dead goods and chattels, for there, if anything be added for the repairing, mending or improving thereof, the lessor shall have the improvements and additions, together with the principal, after the lease ended, because they cannot be severed without destroying or spoiling the principal; neither is the succession of young ones, in case any of the old ones die, to be resembled to a corporation aggregate, whereof when any die, those that succeed shall be said part of the same corporation, for the corporation, in its public capacity, never dies; but this being a lease of such and such individual cattle, when any of them die, the possibility of reverting property, which was left in the lessor, is determined and at an end. Litt. § 71; Co. Litt. 57 a. But the lessee in such case cannot kill, destroy, sell or give them away, during the term, without being subject to an action of trespass, as it should seem; but in case of a lease of a house, together with goods, it is usual to make a schedule thereof, and affix it to the lease, and to have a covenant from the lessee to redeliver them at the end of the term, and without such covenant the lessor could have no other remedy but trover or detinue for them after the lease ended. If one hath a corody for life, he may let it to another, or to the grantor himself; so may the grantee of house-bote, or hay-bote; but in case such lease be to the lessor himself, rendering rent, he can have them only by way of reverter, being to arise out of his own provision, or his own land.

Bro. tit. Leases, 40. But as to lands or other things of inheritance, as they may be granted or departed with forever, so they may for a time, and may be consequently, leased for years in all cases where no inconvenience or injury to the public is likely to ensue; for then men's private interests must give way to the public, and what might otherwise in its own nature be good and allowable, must upon that account be disallowed and stand condemned; wherefore, it having been settled that all leases for years were but chattels, and as such should go to executors or administrators." Roll. Abr. 847; 2 Roll. Abr. 158; Sir George Reynold's Case, Cro. Car. 587; 9 Coke, 97.

¹ Shep. Touch. 268; 1 Platt on Leases, 24. The objects of dominion or property are *things* as contra-distinguished from *persons*; things are *two-fold*, things *real* and things *personal*; things *real* are such as are permanent, fixed, and immovable, as *lands* and *tenements*; things *personal* are goods, money, and all other movables which may attend the owner's person wherever he thinks proper to go. Things *real* are distributed into three divisions or classes, viz.: *lands*, *tenements*, and *hereditaments*. Of these three divisions, the second contains the first, and the third contains both. *Land* comprehends all things of a permanent and substantial nature, being a word of a very extensive signification. *Tenement* is a word of still greater extent, and though in its vulgar acceptation it is applied only to houses and other buildings, yet in its original, proper, and legal sense, it signifies everything that may be holden, provided it be of a permanent nature, whether it be of a substantial and sensible, or of an unsubstantial, ideal kind. 2 Blackstone's Com. 16. A tenement may be said to be any house, land, rent, or other such thing, that is in any way held or possessed; but being a word

² Anonymous, Dyer, 323 b. pl. 30.

corodies,' estovers,' ferries,' fisheries,' ministerial

large and ambiguous meaning, and not so certain as message, therefore it is not fit to be used to express anything which requires a particular description. 2 Lil. Abr. 566. The word tenement is joined with the adjective *frank*, to denote an estate in lands, offices, &c., for life or in fee. Kitch. 41. Thus, *liberum tenementum*, franktenement, or freehold, is applicable not only to lands and other solid objects, but also to offices, rents, commons, and the like; and as lands and houses are tenements, so is an advowson a tenement; and a franchise, an office, a right of common, a peerage, or other property of the like unsubstantial kind, are all of them, legally speaking, tenements. 2 Black. Com. 17. *Hereditament*, is anything which may be *inherited*, or may pass to an heir. *Hereditamenta* signify all such things immovable, be they corporeal or incorporeal, as a man may have to himself and his heirs by way of inheritance;—see 32 H. 8 c. 2; or not being otherwise bequeathed, do naturally, and of course, descend to him which is next heir of blood, and fall not within the compass of an executor or administrator, as chattels do. It is a word of large extent, and much used in conveyances; for by the grant of hereditaments, isles, seignories, manors, houses, and lands of all sorts, charters, rents, services, advowsons, commons, and whatever may be inherited, will pass. Coke on Lit. fol. 6. *Hereditamentum est omne quod jure hæreditario ad hæredem transeat*. Cow. Int. An hereditament, says SIR E. COKE, is by much the largest and most comprehensive expression; for it includes not only lands and tenements, but whatsoever may be *inherited*, be it corporeal or incorporeal, real, personal, or mixed. Thus, an heirloom, or implement of furniture, which by custom descends to the heir, together with a house, is neither land nor tenement, but a mere movable; yet

being inheritable, is comprised under the general word hereditament: and so a condition, the benefit of which may descend to a man from his ancestor, is also an hereditament. 2 Black. Com. 17. Hereditament, therefore, is the most comprehensive word which occurs in the English law or language, as a designation or conveyance of property. Hereditaments mean lands, tenements, and hereditaments, and are considered as having that comprehending force, not only in pleading and conveying, but in those acts of parliament where the word hereditament is used alone; in such cases it includes everything which can be *inherited*; that is, which may go to the heir, but not to the executor or administrator, and may be regarded as opposed to *chattels*, and together with chattels, including all descriptions of property; so that all property may admit of one grand division, namely, either an *hereditament*, or a *chattel*. Such is the view of the relative import of these three important words, and more especially hereditament, as laid down in Blackstone, and sanctioned by the previous current of authorities. LORD KENYON, however, in *Doe d. Small v. Allen*, 8 T. R. 497, 503, seems to vary the import of the word hereditament, and consequently to unsettle the definition and classification as given by Blackstone, wherein he says: "The next point arises on the word hereditament; it is not so strong a word as tenement; it is merely a description of the thing itself, and not of the quality got, or the interest in it; if the word 'estate' had been used, that would have been sufficient to carry the fee." Certainly this distinction of LORD KENYON accords with the difference taken between the two words *hæreditas* and *hereditamentum*; namely, that the word *hæreditas* imports the estate which a man has in the lands; but *hereditamentum* the land itself, which

¹ 4 Bacon's Abr. Tit. Leases (A.).

² Bro. Abr. Tit. Leases, 40; Bacon's Abr. Tit. Leases (A.); 1 Platt on Leases, 24.

³ Peter v. Kendall, 6 B. & C. 703; Hansen v. Kintley, 11 Iowa 505.

⁴ Duke of Somerset v. Fogwell, 5 B. & C. 875.

offices, ' franchises, ' tolls, ' rights of common, ' rights of

may be inherited, and therefore cannot be implied to the estate in the land. *Hopewell v. Ack*, 1 Com. R. 164. But this difference is taken only *arguendo*, and not noticed by the court, and the authorities of Coke and Holt are strong with the definition given by Blackstone. Co. Lit. 19, 20; Inst. 6. GOULDING, J.—She hath an estate in fee simple, because the word hereditament implieth a fee. HOLT, C. J.—She hath a fee simple by reason of the word hereditament; for if he had intended to have given her only an estate for life, the words "all my lands and tenements" would have sufficiently implied a freehold without the word "hereditament," and therefore that word doth make her have estate in fee; for *hereditas significeth an estate descendable, as well as that which hath descended*. *Smith v. Tyndall*, Holt, 285. These two great authorities support the view taken by Blackstone on the relative classification of these three grand terms in law, "lands, tenements,

and hereditaments," with his definition of the last. Hereditaments, then, to use the largest expression, are of two kinds, corporeal and incorporeal; corporeal consists of such as affect the senses; such as may be seen or handled by the body; incorporeal are not the object of sensation, can neither be seen nor handled, are creatures of the mind, and exist only in contemplation. 2. Black. Com. 17. All corporeal hereditaments may be comprehended under the word land. Land, in Latin *terra*, in French *terre*, and anciently written with a single r, in that sense included whatever might be ploughed, *terra dicitur a terendo, quia vomere teritur*, and therefore, in its restrained sense, extended only to arable land; but in its general and legal signification, land is a term most extended in its meaning, and includes every sort of ground, as meadow, pasture, arable, wood, &c. *Terra est nomen generalissimum et comprehendit omnes species terræ*. Land, in legal signification, comprehends

¹ *Veale v. Prior*, Hardr. 851. All offices of a purely ministerial character, which did not concern the administration of justice, and which required only common skill and diligence, and which might be executed by deputy without inconvenience to the public, might be granted at common law. *Jones v. Clerk*, Hardr. 46; *Bellamy v. Burroughs*, Farr. 97; *Drummond v. Duke of St. Albans*, 5 Ves. 486. But an office of trust, or one requiring skill or capacity in its execution, did not come under this head. *Meade v. Senthall*, Cro. Car. 587; *Sutton's Case*, 6 Mod. 57. But, in *Pragers v. Phrasier*, 2 Shaw, 171, LORD HALE expressed the opinion that an office of trust might be granted; and a similar view was adopted in *Jones v. Bird*, Hardr. 49; and in the latter case, BARON NICHOLAS declared that *Reynel's Case*, 9 Coke, 97 a., holding a contrary doctrine, is not good law, because, for the same reason, that the court decided that in that case the office could not be granted for years, it could not be granted in

fee. Offices that were purely ministerial, were demisable to women. *Lady Russell's Case*, Cro. Jac. 17; *Spel. Glossary*, 497. A woman was appointed governor of Chelmsford workhouse, *M. 2 Anne*. Lady Broughton was keeper of the gatehouse, 8 Keb. 321; 4 Inst. 221, 415. Lady Packington was the returning officer for members at Alesborough. *Brady's History of Boroughs*. But it will not be profitable to pursue this question here, as there is not much likelihood that offices will ever be granted in this country, as the scramble for them by the impecunious friends of leading politicians is so great, that even the original incumbent generally holds by a feeble tenure.

² *The Duke of Somerset v. Fogwell*, 5 B. & C. 875. Any franchise is demisable, except where it is personal. 2 Inst. 221, 406.

³ *Harris v. Morrice*, 10 M. 260; *Walker v. Richardson*, 882; *Brigland v. Shafter*, 5 M. Aldragd v. Crampton, 4 B. C. 24.

⁴ *Luney v. Brown*, Lutch.

way, 'rights of herbage,' and tithes.' So, too, says MR. PLATT, 'chattels, such as farming implements and furniture, may also be demised; so may a flock of sheep or other live animals.' The lessee is entitled to the use and profit of them during the term, but he cannot destroy, kill, sell, or give them away, without exposing himself to an action of trespass.' The property of such animals as may die during the term belongs to the lessee, and hence the lessor has not such a reversion as can be granted over, either during the demise or in

any ground, soil, or earth, whatsoever; as, meadows, pastures, woods, moors, waters, marshes, furze, and heath; it includes also messuages (that is, houses), tofts (that is, places where houses once stood), mills, castles, and other buildings, for in conveying the lands, the buildings pass with it. 1 Inst. 4. It is observable that *water* is here mentioned as a species of land, which may seem a kind of solecism; but such is the language of the law; and therefore I cannot bring an action to recover possession of a pool or other piece of water by the name of *water* only; either by calculating its capacity, as, for so many cubical yards; or, by superficial measure, for twenty acres of water; or, by general description, as, for a pond, a watercourse, or a rivulet; but I must bring my action for the land that lies at the bottom, and must call it twenty acres of *land covered with water*. 2 Black. Com. 18. So that if a man grants all his lands, he grants thereby his castles, houses, and all other buildings, "for they consist," saith LORD COKE, "of two things, *land*, which is the foundation, and the *structure* thereon; so that if I convey the land or ground, the structure or building passes therewith. *Land* hath also, in its legal signification, an indefinite extent, upwards as well as downwards. *Cujus est solum, ejus est usque ad cælum*, is the maxim of the law, upwards; therefore, no man may erect any building, or the like, to overhang another's land; and downwards, whatever is in a direct line, between the surface of any land and the centre of

the earth, belongs to the owner of the surface; as is every day's experience in the mining countries. So that the word *land* includes not only the face of the earth, but everything under it or over it. And therefore if a man grants all his lands, he grants thereby all his mines of metal and other fossils, his woods, his waters, and his houses, as well as his fields and meadows. Not but the particular names of the things are equally sufficient to pass them, except in the instance of water; by a grant of which, nothing passes but a right of fishing; but the capital distinction is this: that by the name of a castle, messuage, toft, croft, or the like, nothing else will pass, except what falls with the utmost propriety under the term made use of; but by the name of the land, which is *nomen generalissimum*, everything terrestrial will pass. Co. Litt. 4; 2 Black. Com. 19.

¹ Newmarch v. Brandling, 8 Swanst. 99; Osborn v. Wise, 7 C. & P. 764.

² Kuny v. Brown, ante; Hill v. Barry, Hay & Jo., 683.

³ Brewer v. Hill, 2 Anst. 413; Windsor v. Gover, 2 Saund. 302.

⁴ 2 Platt on Leases, 26, 7.

⁵ Collins v. Harding, Cro. Eliz. 606; Newman v. Anderson, 2 N. R. 224.

⁶ Spencer's Case, 5 Coke, 16 b; Wood v. Foster, 1 Leon, 42; Wood v. Ash, Godf. 112; Emmatt v. Cole, Cro. Eliz. 255; Billingsley v. Hershey, 2 Bulstre, 5.

⁷ See cases cited in last note; also Lit. Sec. 71.

⁸ Wood v. Foster, ante; Wood v. Ash, ante.

the interval between its determination and the re-delivery of the sheep. He has only a possibility of property in case they outlive the term. The young belong absolutely to the lessee, as profits arising and secured from the principal.¹ The sum reserved for the use of chattels is denominated rent, but, strictly speaking, rent cannot be reserved out of an incorporeal hereditament; and although it may be recovered on the express covenants for payment or on the reddendum, which amounts to an implied covenant,² yet a distress will not lie therefor.³

SEC. 204. *Reversion in lessor.*—In order to operate as a lease, the lessor must convey a less estate than he possesses, because if he conveys his *whole* estate, it is an assignment, and not a lease; and that is the effect of the instrument, whatever may be the form of words used in it,⁴ for where a party, though professedly making an underlease, *parts with his whole term*, that amounts to an assignment, which is, in point of law, merely the transferring and setting over to another that interest, however it came, which the party has.⁵ *As between the parties*, however, such

¹ 2 Platt on Leases, pp. 26, 27.

² Lovelace v. Reynolds, Noy. 59; Co. Litt. 47 a.; Gardiner v. Williamson, 2 B. & Ad. 336; Neale v. Mackenzie, 2 C. M. & R. 34.

³ Gardner v. Williamson, ante.

⁴ LORD TENTERDEN, C. J., in Thorn v. Woolcombe 3 B. & Ad. 595; Barrett v. Rolf, 14 M. & W. 348; Cotter v. Richardson, 7 Exchq. 143; Palmer v. Edwards, 1 Doug. 187; Pascoe v. Pascoe, 3 Bing. N. C. 898; Preece v. Corrie, 5 Bing. 24. The fact that the grantor uses the word "demise," does not change the effect of the instrument, because that word is of general application, and imparts only some species of conveyance, and is applied to an estate, either in fee simple, fee tail, for life, or for years. 2 Inst. 483. If a lessee for three years *demises* it for four years, it is in legal effect an assignment, and not an under lease. Hicks v. Downing, 1 Ld. Rayd. 99. In Palmer v. Edwards, 1 Doug. 187 n., it is laid down as a rule, that wherever the whole interest is conveyed and no reversion left,

it is an assignment, and this case cited at the commencement of this note. In equity, a merger may be permitted to take effect or not, according to the apparent intent of the parties, and the interests to be affected thereby. Davisthorpe v. Porter, Amb. 600; Thomas v. Kemys, 2 Vern. 348; St. Paul v. Lord Dudley, 15 Ves. 167. But, at law, the views or beneficial interests of parties do not control the operation of a deed creating a merger, explains Poultney v. Holmes, 1 Stra. 405, and shows that a reservation of rent to the grantor does not affect the question. A similar doctrine was held in Parmeter v. Webber, 8 Taunt. 593; Preece v. Corrie, 5 Bing. 24, and the cases Webb v. Russell, 3 T. R. 393; Co. Litt. 45 b.; Utben v. Godfrey, 1 Dyer, 309 b.; n. 78; Lewis v. Bowles, 11 Coke, 83 b.; Threr v. Barton, Moore, 94; Burton v. Barclay, 7 Bing. 756. See also 3 Preston's Conveyancing, Chap. 5, p. 43.

⁵ 5 Bacon's Abr. Tit. Assignment, 249; McMurphy v. Mirat, 4 N. H. 251.

an instrument may, for some purposes, be treated as an underlease, when that is necessary to carry into effect the intent of the parties.¹

SEC. 205. **Essential requisites of a lease.**—In order to constitute a valid lease, certain elements must always concur: 1st. There must be a lessor who is legally competent to make a lease. 2d. A lessee who is competent to take the thing demised. 3d. A subject matter that is demisable. 4th. And in all cases where so required by law, as where the thing granted is not otherwise grantable, or where the person granting can only grant by deed, the lease must be by deed containing a certain description of the lessor, the lessee, and the thing demised, the term granted, the rents and covenants, and all the necessary formalities, as sealing, acknowledgment, delivery, &c. 5th. If the lease is for years, there must be a certain commencement, at least when it takes effect in interest or possession, and a certain determination, either expressly by stating the number of years, or by reference to a certainty that is expressed, or by reducing it to a certainty that is expressed, or by reducing it to a certainty upon some contingent event which must happen before the death of the lessor or lessee. 6th. Where required, there must be all needful ceremonies, as livery of seizin, attornment, &c., or if any statutory requirements are im-

¹ In *Pollock v. Stacy*, 9 Q. B., an action for use and occupation was sustained in favor of a person who had demised to another the *whole* of his term in certain premises at a weekly rent. LORD DENMAN, C. J., saying: "The parties intended to contract the relation of landlord and tenant, and to pass the right of possession by a parol lease. This they were at liberty to do by law, and we therefore carry their lawful intention into effect. If we were to decide that the transaction was an assignment, we should at the same time decide that it was no assignment, being by parol only. * * * As important rights and duties arise often from assign-

ments of terms, the law has properly provided that the relation of assignor and assignee shall not be contracted, unless the intention is proved by deed. But in protecting against imperfect evidence of assignment, there was no need to alter the law of leasing; and it appears to us to remain unchanged, and we see no inconvenience in supporting as a lease that which was intended to be so, *although it may pass all the lessor's interest*." See also *Poultney v. Holmes*, 1 Str. 405; *Baker v. Gostling*, 1 Bing. N. C. 19; *Cotter v. Richardson*, 7 Exchq. 143; *Williams v. Hayward*, 1 E. & E. 1040.

posed, they must also be observed ; and, 7th, there must be an acceptance of the demise, and of the estate by the lessee.¹

SEC. 206. Operative words.—Description of premises.—No particular form of words are requisite to make a lease ; any words that show an intention on the part of the lessor to divest himself of the possession of premises, and confer it upon the lessee for a term, whether long or short, is sufficient, but the lessee also should sign the lease, or in some manner become bound by such covenants as it is agreed that he shall perform. The usual words employed, and what may be denominated the operative words, are “demise and lease,” “hath leased and hereby doth lease,” “grant, demise and to farm let,” or “hath let,” or *any* words that amount to a grant are sufficient,² and that,

¹Shep. Touch. 267 ; Woodfall's L. & T. 88. In *Wilkinson v. Roper*, 74 Ala. 140 ; a contract may be so framed as to operate either as a sale or as a lease—either a purchase or a tenancy ; as in *Collins v. Whigham*, 58 Ala. 438 ; where the contract was construed as giving the option to the purchaser, in the first instance, to treat it as a purchase or as a lease, and on his failure to express by the day named, it was held that the vendor might elect.

Where lands are conveyed by absolute deed with covenants of warranty, the purchaser giving his written obligations to deliver twelve bales of cotton to the vendor, in annual installments of four bales each, and a mortgage on the land to secure their payment ; a stipulation in the mortgage in these words, “And in case of failure to make the first two payments on said land, then, we agree and hereby promise to pay said W. (vendor) two bales of cotton each year for the rent of said lands,” does not of itself show that the contract was a conditional sale dependent on the payment of the first two obligations at maturity and on default of such payment operating only as a lease from year to year. But the acts and conduct of the parties under the contract as proved by receipts given and

accepted, and other writings, show that they so understood and regarded it, or subsequently modified it, and that the cotton delivered was paid not as purchase money but as rent.

²Woodfall's L. & T. 87 ; Co. Litt. 45 ; *Smith v. Simons*, 1 Root (Conn.), 318 ; *Jackson v. Hughes*, 1 Blackf. (Ind.) 421. The words “I agree to let and hereby do let” are sufficient. *People v. Kelsey*, 38 Barb. (N. Y.) 269 ; *Bacon v. Bowdoin*, 23 Pick. (Mass.) 401. “A hath let,” held to create a lease. *Livingston v. Kisselbrock*, 10 John. (N. Y.) 336. A covenant “to stand seized,” if made by the owner, or a covenant for quiet enjoyment, *Pritchard v. Dodd*, 5 B. & Ad. 689, is a lease. *Bassett v. Thomas*, 3 Burr. 1441, for a covenant accompanied by an entry amounts to a lease, but the covenant merely, does not vest the estate in the lessee, but only gives him a right to enter and possess it ; it is only vested by entry. *Capley v. Hepworth*, 12 Mod. 1 ; Co. Litt. 87, and even a formal lease creates only an *inter esse termini* before entry. *Burnett v. Guilford*, 11 Exchq. 19. The words “shall have and enjoy” amount to a present demise, even without other words to qualify them. *Whitlock v. Horton*, Cro. Jac. 91 ; *Muldon's*

even though mere words of license or permission are used, *as, in all cases, whether a license confers an interest in the land, it amounts to a lease.*¹ A writing as follows: "Received of B three dollars and fifty cents for the rent of my brick house, in, &c., for one month, *with the privilege of keeping it six months longer at the same rate,*" and signed by the lessor, was held operative as a lease of the premises for the period named therein,² and a mere license to occupy premises from a certain day to a certain day, or for any *definite* period, and giving *exclusive* possession, is a lease, and may be plead as a lease, and possibly as a license.³ But in order to make any words operative as a lease, it must appear from the instrument that such was the *intention* of the parties, otherwise they only amount to an agreement for a lease, even though a specific time when possession shall be given, the length of the term, and all the incidents to a tenancy are named therein.⁴ Thus, where a memorandum of a lease was drawn up, but among the terms agreed upon was one that the tenant should bring a surety on a future day and sign the lease, he having failed to bring the surety, it was held as mere

Case, Cro. Eliz. 33; Drake v. Munday, Cro. Car. 207; Jackson v. Ashburner, 5 T. R. 163; Tisdale v. Essex, Hob. 84; Plowden v. Cartwright, 1 Burr. 282. So "shall take and have the profits," Anonymous, 3 Salk. 223, or "shall have the use of &c., and may use." Anonymous, 11 Mod. 42.

¹ In Smith v. Simonds, 1 Root (Conn.) 318, it is held that a writing which, for a valuable consideration, grants the right to plow a man's land for a certain number of years, for a certain consideration, is a lease, and must be recorded as such.

² Munson v. Wray, 7 Blackf. (Ind.) 483. A lease, written by the lessee, containing his name as one of the parties, signed by the lessor, and recorded by the lessee, who took possession and occupied under it, though he did not sign it, was held to be sufficiently executed by the latter so as to make him liable thereon. Taylor v. Cabanne 8 Mo. App. 131. Where the signing and sealing of a lease for 99 years, re-

newable forever, is attested by but one witness, the lessee acquires only an equitable title. Abbott v. Botsworth, 36 Ohio St. 605.

³ Hall v. Seabright, 1 Mod. 42; Anonymous, 11 Mod. 42. But a contrary doctrine was held in Wood v. Lake, Say. 3, and a parol license from A to B to stack coal on a certain close for the period of seven years, B to have the exclusive use of the close for that period, was held *not* to be a lease, or to convey an interest in the land, and consequently was not within the Statute of Frauds. But the doctrine of this case is wholly untenable, and does not seem ever to have been regarded as law, otherwise all leases of premises, *restricted to a particular purpose*, would be operative only as licenses.

⁴ Bicknell v. Hood, 5 M. & W. 104; Rawson v. Eicke, 7 Ad. & El. 451; Chapman v. Townner, 6 M. & W. 100; Burnell v. Curtis, 4 Jur. 490; Scully v. Murray, 34 Mo. 420; Haughery v. Lee, 17 La. An. 22; Brewer v. Hill, 2 Anst. 413.

unaccepted proposal for a lease.¹ A lease should contain all the incidents agreed upon by the parties, and the covenants, conditions, exceptions or reservations should be clearly stated, so as not to be open to misconception or misconstruction, as nothing can be added to or taken from a lease by parol evidence. It will be construed according to the legal effect of the language used, taking it as a whole,² and parol evidence is never admissible to detract from or add to it.³

¹ Bingham v. Cartwright, 3 B. & Ald. 326.

² It is presumed that the writing embodies all the terms agreed upon, and in the absence of fraud, mistake or surprise, verbal or other extrinsic evidence is not admissible to contradict or control it. Gerard v. Frankel, 30 Beav. 445; Woolam v. Hearn, 7 Ves. 218; Omerod v. Hardman, 5 id. 730, as that *more or less* rent was agreed upon, Preston v. Morceau, 2 W. Bl. 1249, or that it was agreed that the rent should commence at a time other than that named in the lease, Hanson v. Cooper, 3 Scott N. R. 48, or that the rent is to be net rent. Rich v. Jackson, 4 Bro. C. C. 514. But, unless expressly or impliedly excluded evidence of a custom may be admitted to explain a lease. In re Stroud, 8 C. B. 502, and parol evidence may be given to explain a latent ambiguity. Osborn v. Wise, 7 C. P. 761; Doe v. Burt, 1 T. R. 701; Coker v. Guy, 2 B. & P. 565; Doe v. Hiscock, 5 M. & W. 363. So where technical words are used, which have a peculiar and special or local meaning, understood by a particular class, evidence of such meaning is admissible. 3 Starkie on Evidence, 1033. Thus, evidence has been admitted to show that the word "thousand" in a lease, by local usage meant 1200, Smith v. Wilson, 3 B. & Ad. 728, or, that the word "level" in a mining lease, was not used in the ordinary sense of a horizontal plane, but in a sense peculiar to mines. Doe v. Benson, 4 B. & Ald. 588. But in all cases it is a question for the jury whether the word was used in its ordinary, or in its technical sense. Clayton v. Gregson, 5 Ad. & El. 302; Smith v. Wilson, 3 B.

& Ad. 733; Doe v. Lea, 11 East, 812. But where the words used have a fixed legal signification as to quantity, quality or time, when used in a lease with no qualifying words, it is presumed that they were used in their legal sense. Smith v. Wilson, ante. So sometimes parol evidence is admissible to show the state of the premises when the lease was made, and the character of the former occupancy. Hall v. Lund, 1 H. & C. 676; Osborne v. Wise, 7 C. & P. 761. If the construction to be given to a deed or lease is doubtful, the circumstances connected with its execution, and the subsequent conduct of the parties as to occupation under the deed, may be properly considered in determining what was intended by the parties. Bradford v. Cressey, 45 Me. 9. All the parts are to be considered and construed together. Every part should, if possible, be made to take effect, and every word to operate, if by law it may, according to the intention of the parties. If a deed, or any portion of it, cannot operate in one form, it shall operate in that which by law will effectuate the intention of the parties; and every deed is to be construed with reference to the actual rightful state of the property conveyed by it, at the time of its execution. Richardson v. Palmer, 38 N. H. 212. As a general rule, the express mention of one thing in a grant implies the exclusion of another. Pray v. Great Falls, &c., Co., 38 N. H. 442.

³ Wilson v. Dean, 74 N. Y. 531. Nicoll v. Burke, 78 N. Y. 580. Phillbrick v. Emswiler 92 Ind. 399. Naumberg v. Young, 45 N. J. L. 331. But see Griffam v. Pierce (Mass.) 9 Eastn. Rep. 552.

SEC. 207. *The premises.*—The *premises* of a lease—being that part which precedes the *habendum*—should rightly name and describe the parties to the lease, the consideration and the thing demised.¹ An accurate description of the premises is indispensable, not only for the purposes of identification, but also because nothing passes except what is named in the lease. Therefore, the thing demised should be set forth with certainty, either by express words, or by reference to something, from which it can be reduced to certainty.² Thus, a description of premises as “being the building now or lately occupied by Richard Roe,” or “the premises known as the Warren farm,” or “the Phelps place,” designating the town in which they are located, is sufficient, because the lease furnishes data from which the premises demised can be identified.³ So a description of the premises demised, as those conveyed to the lessor by a certain person, and referring to the deed, or even without reference to the deed, is good, as, “the premises lying, &c., which were conveyed to me by John Doe,” is good. But such descriptions in such general terms are dangerous, as, if John Doe had conveyed several parcels to the lessor by separate deeds even, the title to which still remained in him, all the parcels lying in the town named would pass to the lessee, unless restricted by the words of the grant, although it was not the intention of the parties that more than one of them should pass, and upon the other hand if there are any words of restriction, although not so intended, they will so operate, as, if A leases to B *all* the premises conveyed to him by C, lying in the town of Woodstock, when a part of the land lies in Pomfret, only the land lying in Woodstock will pass, although it was the intention of the parties to embrace the premises in both towns, in the lease;⁴ but

¹ Farquharson v. Eicheilberger, 15 Md. 63. And a lease omitting the name of either the lessor or lessee, is void. Whittaker v. Miller, 73 Ill. 381.

² Camley v. Stanfield, 10 Tex. 546; Vose v. Bradstreet, 27 Me. 156. Where a lot is accurately described by its number, as, lot No. 2, the fact that the metes and

bounds, given are applicable to another lot (No. 4), which the lessor did not own, is valid as a lease of No. 2, especially if possession of No. 2 is taken under it. Lusk v. Druse, 4 Wend. (N. Y.) 313.

³ 2 Preston's Conveyancing, 449; 2 Platt on Leases, 28.

⁴ Hall v. Combs, Cro. Eliz. 368. A conveyance of lands supposed to

if the land is described as being in *two* towns, when it is really in but one, the lease will be good, and all the land in either of the towns will pass, upon the principal that the greater includes the less.¹ If a lease is made of a farm now in the possession of A, the lease will pass no more of the estate than A was in possession of when the lease was made, and if any part of the farm was reserved from A's lease, it will not pass to the lessee, although no such reservation was made in the lease to him, and although no such reservation was intended by the parties.² It is a general rule that there must be sufficient certainty of the premises granted, and if there is an uncertainty respecting the parcels, the lease, as to such parcels, will be void;³ but it is immaterial whether the certainty is in the deed, as a substantial or independent description, or depends upon some other deeds or facts referred to therein,⁴ for in such cases, the maxim *id certum est quod certum reddipotest* justly applies."⁵ Another

lie in H county, described as beginning on the G county line but in fact beginning a half mile within G county, passes all the lands lying in H county. *Hale v. Hord*, 11 Hink. (Tenn.) 232.

¹ Anonymous, Clayt. 123, pl. 218.

² *Bartlett v. Wright*, Cro. Eliz. 299.

³ 2 Preston's Conveyancing, 451. Descriptions of premises in deeds or leases are to be construed liberally, according to the intent of the parties, and it is only necessary to the validity of a description, *that after subjecting it to every modification which the actual condition of the premises may require, there must be left some substantial designation of the thing to be conveyed, so that the court can see, looking at the property in the condition in which it was at the time of the deed, that the description can be fitted to it, and was intended by the parties to relate to it.* *Peck v. Mallams*, 10 N. Y. 509. Where the description clearly designates a piece of land as that conveyed, the description cannot be changed by parol evidence of intent, or of acquiescence in another boundary line, unless such an adverse possession be shown as is in itself a bar

to an ejectment. *Emerick v. Kohler*, 29 Barb. (N. Y.) 165.

⁴ 1 Preston on Conveyancing, 184; 2 id. 448, 461; *Shep. Touch.* 244; *Bacon's Tracts*, 102, 105; 4 *Cruise's Dig.* 317; *Bacon's Maxims*, No. 13, p. 25; *Peyram v. Newman*, 54 Miss. 612.

⁵ *Camley v. Stanfield*, 10 Tex. 546, and an evident omission may sometimes be supplied by construction, but only when the words used warrant it, *Hoffman v. Riehl*, 27 Mo. 554, or inconsistent matter may be rejected. *Prescott v. Hayes*, 43 N. H. 593. When the court, by a knowledge of the facts existing, and the situation of the parties at the time when a deed was made, can ascertain the intention of the grantor, they will construe the deed so as to give effect to that intention, when they can find enough in the description, after rejecting all the particulars in which it is false or mistaken, to identify the land. *Lane v. Thompson*, 43 N. H. 320. And where the intention is apparent any error in the particulars or details of a description will be disregarded, *Prescott v. Hayes*, ante, and this applies to any part of an instrument. Thus, if in a deed purporting to be

well settled general rule is, that where the first words of a grant are sufficiently certain in themselves, words of additional erroneous description will not vitiate the grant,¹ but will be rejected as surplusage; and

executed by the agent of a corporation, the general intention is apparent that the corporation make the grant or contract, and any expression is used which is inconsistent with that intention, and if literally construed would defeat the deed, it is to be rejected. *Tenney v. East Warren, &c., Co.*, 43 N. H. 343. See also upon the rejection of erroneous description and holding that the court will uphold the conveyance if practicable by reconciling or rejecting erroneous particulars. *Wing v. Burgis*, 12 Me. 111; *Hall v. Foster*, 7 Vt. 100; *Harvey v. Mitchell*, 31 N. H. 575; *Wright v. Cochran*, 3 Iowa 507; *Smith v. Chatham*, 14 Tex. 322. A deed describing lands as "adjoining the lands of A and B, containing twenty acres more or less" was held to be void for uncertainty. *Dickens v. Barnes*, 79 N. C. 480.

¹See previous note, also *Jackson v. Delaney*, 11 John. (N. Y.) 865. The general rule is, that if the description of the premises given in a deed affords sufficient means of ascertaining and identifying the land intended to be conveyed, after rejecting that which is false, this is sufficient to sustain the conveyance, notwithstanding there may be error or inconsistency in some of the particulars. *Vose v. Bradstreet*, 27 Me. 156; *Bosworth v. Sturtevant*, 2 Cush. (Mass.) 392; *Lyman v. Loomis*, 5 N. H. 408; *Mason v. White*, 11 Barb. (N. Y.) 173; *Eggleston v. Braford*, 10 Ohio 312; *Andrews v. Murphy*, 12 Ga. 431; *Berry v. Wright*, 14 Tex. 270; *English v. Roche*, 6 Ind. 62; *Cambee v. Stanfield*, 10 Tex. 546; *Bird v. Bird*, 40 Me. 398; *Banks v. Ammon*, 27 Penn. St. 172. It is a sound rule of construction that in the construction of a deed, a description which fully ascertains the *corpus* of the property is not defeated by the addition of a further false description. Uncertain- and defects will be rejected, and if enough remains to point

with reasonable certainty to the estate granted, the conveyance will be upheld. In *Hall v. Foster*, 7 Vt. 100, the description began: On the *north* of a certain stream, and by following the courses and distances to another point on the same side of the stream," concluded, "thence on the *south* side to the bounds begun at." It was held, that the words "on the south side," being inconsistent with the intent of the parties gathered from the rest of the deed, should be rejected. *Johnson v. Simpson*, 36 N. H. 91; *Bond v. Fay*, 12 Allen (Mass.) 86; *Crosby v. Bradbury*, 20 Ma. 61; *Myers v. Ladd*, 26 Ill. 415; *White v. Guy*, 9 N. H. 126. A soldier indorsed a conveyance on his discharge, in which he described the premises as follows: "The six hundred acres of land, due from the public, as a soldier, in Colonel Lamb's regiment of artillery," when in fact he was not in that regiment. It was held, that the words, "in Colonel Lamb's regiment of artillery," might be regarded as surplusage, the description being sufficient without them. *Jackson v. Root*, 18 Johns. (N. Y.) 60. See *Jackson v. Loomis*, id. 81; *Jackson v. Ransom*, id. 107. Where the premises in a deed were described as lot No. 51, in the second division of a patent, "as follows," &c., and it was proved that the grantor at the time owned lot No. 50, in the same patent, the boundaries of which exactly corresponded with those in the deed,—Held, that "lot No. 51" might be rejected as surplusage the description being sufficiently certain without those words. *Loomis v. Jackson*, 19 Johns. (N. Y.) 449; and generally, an erroneous description of lands by numbers, will not vitiate the lease, if there are other sufficient descriptive particulars to identify the property intended to be demised. *Bradshaw v. Bradbury*, 64 Mo. 334; *Montgomery v. Johnson*, 31 Ark. 61.

if, after such rejection, enough remains to point with reasonable certainty to the estate granted, the conveyance will be upheld,¹ otherwise it will be wholly void.² Where the description of premises is certain, it will control a statement as to the quantity. Thus, if a lease is made of "my farm in, &c., containing *ten* acres," the whole premises embraced in the farm will be conveyed, although the number of acres is largely in excess of ten,³ and the same rule prevails although the quantity stated is much less.⁴ The words more or less

¹ *Kruse v. Wilson*, 79 Ill. 233; *Weill v. Lucerne Mining Co.*, 11 Nev. 200; *Ex parte Branch*, 72 N. C. 106; *Thayer v. Torrey*, 87 N. J. L. 339; *Armstrong v. Colby*, 47 Vt. 360, and where words of addition are mistaken, and contrary to the near fact, they will not even operate as a restriction on the preceding words. *Swift v. Eyres*, Cro. Car. 546. But, while it is true that where a thing is *certainly* described at first, the addition of another certain description will be rejected, *yet it is otherwise where the thing first described is uncertain*, and in the latter case, it has been held that the conveyance is void. *Downtie's Case*, 8 Coke, 9 b.; *Harris v. Greathead*, 8 East, 91. Except where the case absolutely requires it, it is not best to accumulate description upon description, or to particularize too minutely all the various circumstances of name, place, locality, boundaries and occupation; such only as are sufficient for the purposes of identification should be introduced. If, for instance, the identity can be perfectly established by inserting the *name* of the premises, and the town and county, the other particulars should be omitted. Where numerous circumstances are referred to, questions frequently arise how far they must concur in distinguishing the demised premises, and to what extent words of particular explanation may qualify words of general description, and needless and expensive litigation is thus entailed upon the parties. *Bartlett v. Wright*, Cro. Eliz. 299; *Downtie's Case*, 8 Coke, 9 b. See opinion of PARKE, J., in

Smith v. Galloway, 5 B. & Ad. 43, as to the rule in cases of partial false description. But, when there is nothing that can be fixed upon with certainty, from the description itself, the conveyance is void. *Dickens v. Barnes*, ante.

² *Proctor v. Pool*, 4 Dev. (N. C.) L. 370.

³ *Dawson v. Bell*, 3 Ir. L. Rep. 140; *Large v. Penn*, 6 S. & R. (Penn.) 488; *Pienc v. Faunce*, 37 Me. 63; *Hatch v. Gurza*, 23 Tex. 176; *Hack v. Runka*, 47 Md., 68 Tex. 379; *Mizell v. Simmons*, 79 N. C. 182; *Lewis v. Oakley*, 10 Hick. (Tenn.) 483.

⁴ *Allen v. Allen*, 14 Me. 387. It is a general rule of construction of grants and devises that, where there is sufficient certainty before, by way of description of the thing granted, as by giving to a close a particular name, &c., a subsequent mistake, as in the tenant's name, the number of acres, &c., will not restrict or invalidate it. 2 Rolle's Abr. 52, 54. But where the description is general, and afterwards a *particular* description is added, it will restrict the general description. 1 Inst. 6 a.; 2 id. 240; In *Fletcher v. Clark*, 48 Vt. 211, the rule generally recognized was aptly expressed, that when a general description is followed by a *particular* one, the latter must control, and that parol evidence that gives to the general description a more comprehensive extent than the particular description is not admissible, because it tends to contradict the deed. *Gano v. Aldridge*, 27 Ind. 294; *McEwen v. Lewis*, 26 N. J. L. 541. But where premises are described "all the glebe land lying in

in a deed or lease must be confined to a reasonable quantity.'

As to the proper mode of describing the premises, it may be said that "corporeal hereditaments consist wholly of substantial and permanent objects, and may all be comprehended under the general denomination of land only; for *land* comprehends, in its legal sense, any ground, soil or earth whatsoever, so the word *land* includes not only the *face* of the earth, *but everything over or under it*;" and therefore if a man grants all his lands, he grants thereby all his mines of metal and other fossils, his woods, his waters and his houses, as well as his fields and meadows; not but that the particular name of the things is sufficient to pass them, except in the instance of water, by a grant of which nothing passes but a right of fishing; and to recover the land at the bottom of which, it must be called so many acres of land covered with water. But the capital distinction is this, that by the name of the thing demised nothing else will pass, except what falls with the utmost propriety under the term made use of; but by the name of land, which

viz.: 78 acres of land, all which was lately in the possession of B," the description is good, even though the lands were never in B's possession; for the words *all which* are not words of restriction, but of explanation only, unless the cause is general and the sentence entire. *Swift v. Eyres*, Cro. Car. 548. So a conveyance correctly describing land by its quantity and occupiers, has been held sufficient, although described as being in a town or parish in which no part of it was situated. *Lamb v. Reaston*, 5 Taunt. 207; 3 Preston's Abstracts, 206, 210.

¹ *Day v. Fynn*, 1 Esp. 229; *Cross v. Eglin*, 2 B. & Ad. 106.

² But the maxim *cujus et solum*, &c., like all other maxims, is subject to many exceptions, and a failure to bear this fact in mind often leads to serious errors, and its application is often mistaken, and especially is this the case in populous towns and cities. "It seems to me," says ASHURST, J., in *Beland v. Burt*, 1 T. R. 703, "that

the construction of all deeds must be made with reference to their subject matter, and it may be necessary to put a different construction on leases made in populous cities, from that on those made in the country. We know that in London different persons may have several freeholds over the same spot, different parts of the same house are let out to different people. This is the case in the inns of court. Now it would be very extraordinary to contend that if a person purchased a set of chambers then leased them, and afterwards purchased another set under them, the after-purchased chambers would pass with the lease. In the present case, considering the nature of the property, *it was proper to let in evidence to show the state and condition of it, at the time when the lease was granted*. *Prima facie* indeed, the property in the cellar would pass by the demise, but that might be regulated and explained by circumstances."

nomen generalissimum, everything *terrestrial* will pass."¹ But if a particular kind of land is conveyed, as "meadow land," "tillable land," "mining land," "pasture land," &c., the lease or conveyance will be confined to land of the description named, and in general, where meadow land, pasture land, tillable land, &c., is described, it must be understood as referring to lands that were devoted to such purposes at the time when the lease was made.² If a certain lot is demised, all erections thereon will pass, and *e converso* if a certain building is leased, the land on which it stands and approaches thereto will also pass.

SEC. 208. What passes as an incident of the property.—*Whatever constitutes the essence of the thing granted, or is parcel of it*, will pass with it, although at the time of the making of the lease it is accidentally severed. The word "*furniture*" employed in a lease of "a hotel with the furniture therein," includes that which furnishes, or with which anything is furnished or supplied. Whatever must be supplied to a house, a room, or the like, to make it habitable, convenient or agreeable; goods, vessels, utensils and other appendages necessary or convenient for house-keeping; whatever is added to the *interior* of a house or apartment for use or convenience;³ and the same definition is applicable to the word as applied to a dwelling-house, office, store, &c., reference being had, in its application, to the nature of the thing demised, the use to which it is to be applied, the social condition of the tenant and all the attendant circumstances, to ascertain the quality and character of the furniture intended to be supplied, if any, as well as what is included in the term in the particular demise, and the rights of parties under a

¹ Blackstone's Com. 18.

² Gunning v. Gunning, 2 Shaw, 8; Tresham v. Lamb, 2 Browal, 46.

³ Bell v. Golding, 27 Ind. 173. A platform covering the outlet to cellar steps was not mentioned in a lease of the cellar, and its use was not necessary to the reasonable use of the cellar, and it was held that the tenant could not claim them as appurtenant to the cellar.

Hill v. Shultz, 40 N. J. Eq. 164. Where the leased premises are described as being at a certain number on a certain street, rooms in an adjoining building belonging to the lessor on another street, are not embraced in the lease, although on the lower floor the rooms of both buildings are used together as one room, the partition wall having been removed. Houghton v. Moore, 141 Mass. 437.

lease, and the effect that is to be given to the language used, so far as the incidents of the estates are concerned, are to be ascertained as well from the language used as from the manner in which the property is occupied. Thus, a tenant of the whole of an upper floor of a building would have an exclusive right to the use of the stairs, as an incident of the state demised; but the tenant of one room, or of only a part of an upper floor, would not take such an implied right, because, unless expressly granted, the reservation of a right to use the stairs for access to, and the convenient occupancy of, the remaining portion of the upper floor, is implied. So where there are several tenants in a building, entrance to which is obtained through a single door and hall, although the lease is silent upon that point, each by implication has, as incident to the estate demised, a right to use the door and hall as a means of access to his part of the building, but no one of the tenants has an exclusive right to such use.¹ Where a tenant hires a room in a building, or a floor, fronting on the street, for a term, the lease embraces the outside wall,² and gives the tenant the exclusive right to hang signs upon the outer wall of that portion of the building leased by him, and, if he permits another person to occupy a portion of the space, with a sign, it is a mere license, and does not operate as a breach of a covenant not to sublet.³ So where a house is demised

¹ Perry v. Skinner, 116 Mass. 129.

² Thus in a recent Massachusetts case, *Lowell v. Strahan*, decided June 30th, 1887, this question arose, and ALLEN, J., said: "A lease of the first floor of a building includes the front wall of that part of the building, as parcel of the leased premises, and gives the lessee the right to the exclusive use thereof for signs, and an agreement made by a lessee with a third person, to allow his business sign to remain upon the outside wall of the leased premises, in consideration of an annual payment, is a license, and not a lease, and does not constitute a breach of a covenant against under-letting. If the language had been used in a conveyance in fee-simple,

no question could have been made that the walls of the building were included. Undoubtedly the owner of a building might, in conveying the lower and upper portions of it to different grantees, except the outside of the walls as he might do in conveying the whole building to one grantee. In every case it is a question of intention, found in the language used as applied to the subject-matter, and construed in connection with the whole instrument. A lease for years by indenture differs from a deed in fee-simple, not only in the nature of the estate created, but also in the fact that the instrument of demise is an agreement between the parties, containing mutual covenants affecting their rights in

bounded upon a public street, the lessee, by implication

the premises. The words of description used should be construed in view of these considerations, which might require a different meaning to be given to them than would be given to similar words in a conveyance in fee. The words "first floor in" the building are equivalent to first story of the building, and naturally include the walls. The apparent intention is to separate a section of the building as a distinct tenement. The words "first floor" define the lower and upper boundaries of this, but there is nothing to fix the lateral boundaries except the boundaries of the building. In this respect the words differ somewhat from the word "room." "Floor" means a section of the building between horizontal planes; the words "in a building" show that the section is of the whole building, and not a part of it. The word "room" includes a description of the perpendicular as well as of the horizontal planes which bound the parcel of the house described by it, and excludes the outside of lateral walls, at least when they constitute the walls of another room, as clearly as the words "first floor" exclude the flooring of the story above it. Under what circumstances a lease of a story of a building would include a space beyond the building, over land belonging to it, need not be considered. In this case the building adjoins the sidewalk, and the "lower floor in the building" in the lease must be held to include the entire front wall of that part of the building, unless there is something to control the natural meaning of the language. That the outside of the front wall would be valuable to the lessee as a part of the premises, and that the lease gives him the right to use it for some purposes, such as putting out signs and displaying goods, is not disputed; but it is contended that the right is a privilege or easement, appurtenant to the leased premises in a part of the building not parcel to them. The defendant contends, on the other hand, that the outside of the front wall is parcel of the leased premises. It often occurs in leases of part of a build-

ing that rights in other parts, or in land not parcel of the premises, as in entries, passage-ways and yards, pass as appurtenant to them. The question in such cases generally is not what is parcel of the demised premises, but what is incident to them. In general a deed or lease of a house or store will include the land under it. In *Stockwell v. Hunter*, 11 Metc. (Mass.) 448, and *Shawmut Nat. Bank v. City of Boston*, 118 Mass. 125, it was held that the land under a building would not pass as parcel of the premises in a lease of the basement of a building, the upper stories of which were let to other tenants. In the case at bar the words of description naturally include the premises in question, the outer wall. It is plain that the lease grants an interest in them, not merely like the incidental right of support or shelter which it grants in the land and other parts of the house, but the right to use and enjoy, as leased premises, for the purposes of business. That right is exclusive. The landlord has no right to use or to let it for such purposes. From the mere demise, without regard to special provisions of the lease, there is no reason that the landlord should be regarded as having rights in the outside different from what he has in the inside of the wall. As owner of the upper tenement, he has a right in the whole wall for support, but that right would not operate to exempt the walls, by implication, from a deed in fee of the lower tenement, or from a grant of it for years. The occasions that the reversioner would have to enter upon the wall of the demised tenement must be few and extraordinary, and it could not be inferred, from the fact that the right was not expressly reserved in the lease, that the wall was excepted from it. We can see nothing therefore in the nature of the estate granted, that should prevent the outer wall from being included as parcel of the demised premises. On the contrary, the fact that it is of value to the tenant for the use for which the premises may be occupied, and of no value for use to the landlord, would indicate that it was part of

and as an incident to the estate, acquires an exclusive right to the use of the lands in front of the house and between it and the street, and an exclusive right, except so far as it is qualified by the right to its reasonable use for the purposes of public travel, to all such land, to the centre of the street, if the title thereto is in his landlord.

the premises if the description was doubtful. If it did not pass by the lease in this case, it would seem that the right which the plaintiff claims could be maintained. The only right of the tenant would be to make such use of it as would be incident to his grant of the adjoining premises, and the right of the landlord would be to enter upon it, and make any use of it not inconsistent with the incidental rights to use it of the tenant. He might not have a right to take down the tenant's sign, but he would have the possession of the wall, and the right to enter upon it, and to use any of it not actually used by the tenant for any purpose not inconsistent with the use by the tenant of the leased premises. It is not reasonable to suppose that this was the intention of either party. The actual possession and use of the wall by the tenant which the parties obviously intended is substantially that of leased premises, and it would be very difficult to define or fix the respective rights of the parties in it, except on the assumption that it is a part of the demised premises. *Riddle v. Littlefield*, 53 N. H., and 503 *Baldwin v. Morgan*, 43 Hun. 355, are directly in favor of the conclusion we have reached. The agreement of the defendant to allow the sign of a stranger, in consideration of an annual payment by him, to remain upon the outside wall demised, was permission to do a particular act, to affix a sign to the wall, and gave no authority to do any other act upon the premises. The facts that the permission was paid for, and that the act permitted was a continuing one, are ordinary elements of a license. Every license to do an act upon land involves the exclusive occupation of the land by the licensee, so far as is necessary to do the act, and no further. A lease gives the right of possession of the

land, and the exclusive occupation of it for all purposes not prohibited by its terms. It is clear in this case that the intention was that the licensee should have no other right in the premises than to affix his sign to them, and that every other right should remain in the defendant. An agreement of this nature cannot be construed as a lease. It must create either a license or an easement. We have not been referred to any case in which the question here presented, or any closely resembling it, has arisen. Numerous cases have arisen in England where the question was whether persons occupying land under particular agreements were liable to be rated as occupiers. See *Cory v. Bristow*, 2 App. Cas. 262; *Electric Tel. Co. v. Overseers of Salford*, 11 Exchq. 181; *Lancashire Tel. Co. v. Overseers of Manchester*, 14 Q. B. Div. 267; *Watkins v. Overseers of Milton-next-Gravesend*, L. R., 3 Q. B. Div. 350; *Forest v. Overseers of Greenwich*, 8 El. & Bl. 890. In *Selby v. Greaves*, L. R., 3 C. P. 594, the letting of a defined portion of a room in a factory, with steam-power for working lace-machines, was held to be a demise; and in *Hancock v. Austin* 14 C. B. (N. S.) 634, permission to place lace-machines in a room in a factory, and to work them with steam-power furnished by the owner of the factory, was held to be a license, and to create no demise. The case last cited approaches nearer to the case at bar than any that we have seen, and in that the reasons for regarding the transaction as a lease, are obviously stronger than in this case. That was permission to occupy, with fixed machines, a portion of the floor, and space above it; that is permission to insert fastenings in the outer wall, from which to suspend a sign in proximity to, but outside of the building."

So where lands bordering on an unnavigable stream are leased, the tenant, in the absence of restrictive word, impliedly takes to the centre of the stream,¹ but if the estate borders upon a navigable stream, in which the tide ebbs and flows, he takes only to high water mark, because by law the landlord's title ends there.² The demise of a "house" without the use of words to qualify or extend the meaning of the parties, will pass no more land than is *necessary* for its complete enjoyment,³ including, however all the land that is covered by the building and the eaves thereof if the landlord owns the land,⁴ but not adjoining buildings, although *necessary*, and used with the building.⁵ But, as buildings are an incident of land, a lease of land will carry with it *all* the buildings thereon, whether necessary to its enjoyment or not, and, although it describes the premises as a certain farm, and the farm house thereon.⁶ So by the grant of a mill the millstones pass, although severed at the time of the grant. So by the grant of a house the doors, windows, sashes, locks, keys, bolts, and all fixtures pass, although not in their proper places;⁷ but, generally, unless they have previously been

¹ *Jackson v. Lann*, 12 John. (N. Y.) 252; *Halsey v. McCormick*, 13 N. Y. 296.

² *Gould v. R. R. Co.*, 6 N. Y. 522; *Wiswall v. Hall*, 8 Paige Ch. (N. Y.) 313.

³ *Bennett v. Bittle*, 4 Rawle (Penn.) 339.

⁴ *Sherman v. Wilkins*, 113 Mass. 481. A owned two lots of land, one fronting on E. street and the other adjoining the first in the rear. Both lots were bounded on one side by M. street. Before A acquired title, a building had been erected, three stories in height, covering both lots, and having a partition wall, through which there was no passageway between the two on the line of the two lots. A took down the partition wall on the first floor, thus making one large room, but did not alter the partition wall above. The entrance to this room, and to the rooms above on the front of the building was from E. street. The rooms in the rear on the two upper floors were reached by an outside

staircase, in the rear of the building from M. street. A then made a lease to B, in which the building was described only by its number on E. street. It was held that the rooms in the rear in the upper stories were not included in the lease. *Houghton v. Moore*, 141 Mass. 437.

⁵ *Ogden v. Jennings*, 62 N. Y. 53.

⁶ *Hay v. Cumberland*, 25 Barb. (N. Y.) 594.

⁷ *Chambers*, 800. An iron grating in front of a city building which protects the windows, and admits light and air into the basement, is an incident of the tenancy of the basement, and necessary to the beneficial enjoyment of it, and if it is obstructed, an action lies in the name of the tenant, therefor. *Spies v. Domm*, 54 How. Pr. (N. Y.) 293. The rule as stated in the text has been adopted in construing and applying a policy of insurance on machinery, and the same rule prevails in the construction of a lease. As to what

annexed to the freehold, they have not become a part hereof, and do not pass. Thus, materials collected for the purpose of building, but which have not been actually used for that purpose, do not pass.¹ In determining whether or not a chattel is so annexed to the freehold, or has been so annexed thereto as to become a fixture, reference must be had to the *nature* of the chattel itself, the position to the premises of the party placing it there, and *his probable intention* in doing so,² and, therefore, is always a matter of evidence.³

A demise of premises described as premises "late in the occupation of A," part of which is a yard, will not pass a cellar *under* that yard, which was then in the occupancy of B, another tenant of the lessor; because, although *prima facie*, the property in the cellar would pass by the demise, yet, the demise is liable to be regulated and explained by circumstances showing the situation of the

constitutes *machinery* is a question of law for the court, and not a question of fact for the jury. *Buchanan v. Exchange Ins. Co.*, 61 N. Y. 26. A policy covering "machinery" will be construed to cover all instruments used, or intended to be operated exclusively by machinery in the business of the assured, and which are so operated from time to time in the regular and ordinary prosecution of the business described or referred to in the policy, although such instruments are not a part of any particular machine, but are used in connection with the machinery as occasion requires, in the prosecution of the business. Thus, where the plaintiffs procured a policy upon "their engine and machinery * * for the manufacture of tin-ware, sheet-iron, japanned ware, and fancy plated ware," it was held that the policy covered dies (642 in number) which were used to give form to various utensils manufactured in the prosecution of the business, although such dies were not a part of any particular machine, and when not in use were deposited upon shelves apart from the machines or presses in which they were used. *Seavey v. Central M.*

F. Ins. Co., 111 Mass. 540. So the wheels of a polishing machine, although detached therefrom, are treated as machinery within the meaning of the term, and generally it may be said that any implement or contrivance used in connection with machinery, although not a part of it, in the prosecution of the business, is covered by a policy upon machinery used in that business. *Pierce v. George*, 108 Mass. 78. In *Thropp v. Field*, 26 N. J. L. 82, it was held that where, by the terms of a lease, the landlord is to furnish power for machinery used in a leased building, a blast on the lessor's premises and connected with the machinery is embraced in the demise.

¹ *Beard v. Durald*, 22 La. An. 284.

² *Richardson v. Borden*, 42 Miss. 71; *Voorhees v. McGinnis*, 48 N. Y. 278; *Platt v. New Jersey, &c., Arms Co.*, 14 N. J. L. 395; *Perkins v. Swank*, 43 Miss. 349; *Brown v. Lillie*, 6 Nev. 244. Whether the thing claimed as appurtenant be parcel or not, and the *intention* of the parties, are the rules by which to judge in such cases. *Bryan v. Weatherhead*, Cro. Car. 17.

³ *Doe v. Burt*, 1 T. R. 700.

premises and the parties at the time when it was made.¹ A person may demise a farm, which may comprehend a messuage, and all the land and buildings connected or used therewith, and this, even though the land is detached and consists of several parcels not adjoining. Thus, if A lets to B a farm, as follows; "My farm situate in, &c," this will pass all the land, wherever situated in the town named, occupied and used by A at the time when the lease was made, as a part of his farm. The word farm properly signifies a capital or principal messuage, and a quantity of land thereto appertaining.² So, by the name of messuage,³ only the dwelling-house and outhouses immediately adjoining; and the orchard, garden or curtilage, a dove house, and a shop or mill, lying near and *usually* enjoyed with the messuage, will pass,⁴ or anything that would ordinarily pass by that name.⁵ By the demise of a dwelling-house, together with all the rooms and chambers thereto belonging or appertaining, is to be understood only *what has been occupied together*, as the entire dwelling-house at one time. Where, therefore, the lease was of a house, with all rooms and chambers thereto belonging and appertaining, it was held not to comprehend a room which had been separated from it by

¹ Doe v. Burt, 1 T. R. 701.

² Shep. Touch. 93; Portman v. MHL, 3 Jur. 356; Goodtitle v. Paul, 2 Burr. 1089; Goodtitle v. South-ern, 1 M. & S. 298.

³ There is no distinction between a messuage and a dwelling-house, and whatever will pass by the use of the term messuage will also pass by the use of the word dwelling-house. Doe v. Collins, 2 T. R. 498.

⁴ Smithson v. Cage, Cro. Jac. 526; Shep. Touch. 112; Norton v. Webster, 12 Ad. & El. 442; Cole v. West London, &c., Co., 27 Beav. 242.

⁵ Grosvenor v. Hempstead, &c., R. R. Co., 1 DeG. & J. 446; Steele v. Midland, &c., R. R. Co., L. R. 1 Ch. App. 275; Hanson v. South-Western R. Co., 8 W. R. 467, including a cellar, chamber, a cottage or toft. Shep. Touch. 94. A curtilage is defined to be a little garden, yard, field, or piece of void ground, lying near a dwelling-

house, and it is said that a grant of a *cottage* may include a curtilage and a garden. Finlay's L. & T. 31. A *cottage* was formerly regarded as a nest for idle persons, thieves, stealers of wood, &c., and so prejudicial to public morals, that, by the statute 18 Eliz., chap. 7, their erection was prohibited, unless *four* acres of land were annexed to, to be used with it, and heavy penalties were provided for a violation of the statute. So by the same statute the occupancy of a cottage by more than *one* family was prohibited. Prior to that statute, the legal signification of the term was "a little house or habitation without any land belonging to it," but after the statute came into force, its legal sense was, a small house with four acres of land belonging thereto. Wood's Inst. 468. Hence arises the distinction between the incidents of the demise of a cottage and dwelling-house.

means of a partition, *and had not been occupied with it* for many years previous to the demise.¹ A lease of "dwelling-house" or other "*buildings*," carries with it the land under the eaves and projections, if the land is owned by the lessor,² upon the principle that a grant of the principal carries all the incidents, by implication, whether they are named or the word appurtenances is used or not, unless expressly reserved.³ Where a tenant has previously occupied the premises under a lease for the same purposes and with the same privileges demised to him by the new lease, the character of his former occupancy may be shown, for the purpose of determining whether a certain privilege passes as an incident of the grant. Thus, where a landlord leased by indenture to his tenant a portion of a building, a part of which was occupied by himself, and in which was a steam engine, and agreed to give to the lessee one-half of the steam power; and it appeared that the tenant had occupied the same premises previously, under written and oral leases, and had used the exhaust steam from the engine, by means of a pipe connected with the exhaust pipe to a steamer, used in and *necessary* for carrying on his business, and was so using it when the lease was executed; it was held, in an action against the lessor for cutting away this pipe, and depriving the lessee of the exhaust stream, that the right to use such stream passed to the lessee as an "appurtenant."⁴ Where a lease is made

¹ 2 Starkie's Nisi Prius.

² *Sherman v. Williams*, 113 Mass. 481, and if the lessor consents to the erection of a wall thereon, or any use thereof by another, it is a breach of the covenant for quiet enjoyment. *Id.*

³ *Skull v. Glenister*, 16 C. B. N. S. 61; *Road v. N. Y., &c., R. R. Co.*, 18 Barb. (N. Y.) 80; *Pattison v. Hull*, 9 Cow. (N. Y.) 747. Thus all deeds, warranties, covenants and muniments of title. *Redwine v. Brown*, 10 Ga. 311, unaccrued rents, and incomes not disconnected from the estate so as to become personalty, and all remedies to recover the same, pass under a conveyance of the land, *Winslow*

v. Rand, 29 Me. 362; *Van Wagner v. Van Nostrand*, 19 Iowa, 422; *Roberts v. Levy*, 3 Abb. (N. Y.) Pr. N. S. 311, and all *necessary* easements, such as rights of way, *Breed v. Cunningham*, 2 Cal. 361; *Grant v. Chase*, 17 Mass. 443; *Walker v. Pierce*, 38 Vt. 94; *Brown v. Thissell*, 6 Cush. (Mass.) 254, and all other necessary incidents, as a right against the lessor to have the light and air come through a certain window which was unobstructed when the lease was made. *Doyle v. Lord*, 64 N. Y. 432. See *Bean v. Coleman*, 44 N. H. 439, as to what passes as an incident to the grant of an easement.

⁴ *Thomas v. Wiggers*, 41 Ill. 471.

of certain lands, "being all that part of the park called B, situate and being in the county of O, and now in the occupation of S," lying within certain specified abutments, "with all houses, &c., now in the occupation of S," a house within the abutments, but not in the occupation of S, passes under the lease;¹ but, where lands are described generally, as being in the possession of a certain person, and there is no other or more particular description, no more of the premises will pass than were in such person's possession, although a part, not in his possession, had, from time out of mind, been parcel of the land.² But, under such a description, land and houses will pass, although at the time when the lease was made a part of the premises were in the possession of an under-tenant, under the person in whose possession the premises are described as being.³ The fact that in a lease of a farm or of land generally certain buildings are specified, does not exclude from the lease other buildings upon the premises leased, but not named therein.⁴ If a mill and its appurtenances are let, a race and dam connected therewith presumably pass with it;⁵ so a lease of a mine would carry with it two such ditches as had been cut to convey water to it;⁶ so where premises adjoining a mill pond are conveyed to a person with a clause "and as incident to such conveyance * * exclusive right to take ice from the pond" a lease of such premises with all the appurtenances thereto belonging⁷ would undoubtedly carry with it the right to take the ice from the pond.⁸ Where a person who

¹ Jack v. McIntyre, 12 Cl. & F. 151; Hay v. Cumberland, 25 Barb. (N. Y.) 594.

² Bartlett v. Wright, Cro. Eliz. 299.

³ In Burton v. Brown, Cro. Jac. 643, a piece of ground, or a garden plot, was let to one Juxon, who assigned it to one Ireland who built two houses upon a part of it, leaving the rest as a garden. The landlord subsequently leased the premises to the plaintiff, describing them as "*all that garden plot* or piece of ground late in the tenure of Juxon and now in the tenure or occupation of Ireland." The court held that all the garden plot,

as it was in the tenure of Juxon, although it was afterwards built upon, passed under the lease, for the lessor did not take knowledge of what was done by an assignee, and therefore, by intendment, leased it as entirely as he first demised it to Juxon, and therefore that all the lands *and the two houses* were included in the lease.

⁴ Hay v. Cumberland, 25 Barb. (N. Y.) 594.

⁵ Curtis v. Norton, 58 Mich. 411, Jackson v. Trullinger, 9 Or. 393.

⁶ White v. Barlow, 72 Ga. 887.

⁷ Huntington v. Asher, 96 N. Y. 204; 48 Amrep. 652,

has the right to fasten a boom to his neighbor's land conveys his own land "together with all the booms and piers thereon and privileges thereto appertaining as heretofore used by me," carries the right of fastening the boom on the neighbor's land.¹ But a conveyance of land with the buildings thereon and appurtenances" which makes no mention of water rights, does not convey the grantor's rights to bring water from a stream on other land, by a pipe terminating at a house on the land granted.² Parol evidence is not admissible to show that land which, according to the description of the boundaries in the lease, is included in the demise, is not so in point of fact.³ There are some words which signify more than at first sight they seem to import. By the demise of a house, for instance, a garden will pass, as it is considered to be parcel of a house. So, a demise of a house, together with garden and shed or privy at the further end thereof passes the use of all the garden, and not the use only to pass to the shed or privy; and, therefore, the lessor cannot build on part of the garden.⁴ Improvements of, and addi-

¹ *Hoskins v. Brown*, 76 Me. 68.

² *Williams v. Wadsworth*, 51 Conn. 271. Upon the general question as to what passes as an appurtenance. See *Griffiths v. Morrison*, 86 Hun. (N. Y.) 387; *Ewing v. Sandanal, &c. Coal Co.*, 110 Ill. 290. Land cannot pass as appurtenant to land. *St. Louis Bridge Co. v. Curtis*, 108 Ill. 410.

³ *Shee v. Burtchell*, Arms, Mac. & Og. 95; *Birch v. Stephenson*, 8 Taunt. 469.

⁴ *Kidder v. West*, 8 Lev. 167; *Smith v. Martin*, 2 Sund. 400; *Bettisworth's Case*, 2 Co. 32 a; Co. Litt. 5 b. A garden is parcel of a house, and will pass by grant either with or without the use of the word "appurtenances." *Shep. Touch.* 94; *Clements v. Collins*, 2 T. R. 502. But a demise or devise of a house "with the appurtenances thereto, or in any manner belonging," will not pass land at a distance, though used and occupied by the grantor or testator with the lease. *Hearn v. Allen*, Cro. Car. 57. But the question as to what shall be said to pass under

such general terms as "house" or "messuage" is purely one of intention to be collected, as in other cases of intention, from the whole instrument. *Gulliver v. Poyntz*, 8 Wils. 141. Where a testator being tenant for years of a house, garden, stables and coal bin, bequeathed them as follows: "I give the house I live in and garden to B," it was held that the stables and coal bin occupied by the testator, together with the house, passed, though not expressly named, and although the testator used them for the purposes of trade, as well as for the convenience of his house. *Clements v. Collins*, ante; *Doe v. Martin*, 2 Bl. 1148. But, unless it clearly appears that the testator or grantor intended to extend the word "appurtenances" beyond its technical sense, lands usually occupied with a house will not pass under a devise or demise of a house "with the appurtenances." *Buck v. Norton*, 1 B. & P. 53; *Dell v. Pigott*, 1 Moore, 274; *Belaryse v. Lucan*, 9 East, 458.

tional buildings on, the premises instantly become parcel of the property demised.¹ Generally speaking, a demise of the use of a thing is a demise of the thing itself; but where certain parts of a house, divided from a portion occupied by the lessor, were leased by him with certain easements belonging to the same; with a covenant, during the term, to permit the lessee to have free ingress, &c., through the gate at the bottom of the yard, and use of the pump in the said yard jointly with the lessor, while the same should remain there paying half the expenses of keeping it in repair; it was held, that an action would not lie against the lessor for removing the pump, however capricious or unreasonable his motive might be for doing so; for the pump itself was not a specific subject of the demise, and the words "whilst the same should remain there" give the lessor an option of removing it; nor did the court think such a construction inconsistent with the provision that the lessee should bear a moiety of the charge for repairs.² A lease of the products of land will sometimes pass the land itself, as a lease of "the issues and profits."³ So a grant of a forest, chase, or warren, carries the land with it.⁴ So, by the custom of the country, the soil may pass with the grant of a sheep-walk, or a fold course.⁵ So, the lease of a fishery of a pond, with the spear sedge and the flags and rushes growing in and about the same, has been held to pass the soil.⁶ A tenant however, who goes into possession under an ordinary lease for the use of the premises for ordinary purposes, does not acquire any property interest in anything which exists under the soil. The owner of the land by parting with the possession for a term, does not, in the absence of any provision in the lease to that effect, part with any rights of property in any thing which the soil

¹ *Hoby v. Roebuck*, 7 Taunt. 157; S. C. 2 Marsh. 433.

² *Rhodes v. Bullard*, 7 East. 116; *Pomfret v. Ricroft*, 1 Saund. 321.

³ "Because," as the courts say, "to have the profits of land, is the same thing as to have the land itself." *Parker v. Plummer*, Cro. Eliz. 190.

⁴ Unless the soil and the privilege have been disconnected so that the title is not in the grantor. *Cromwell's Case*, Dyer, 169 b.

⁵ *Huddleston v. Woodroffe*, 2 Rolle, 61.

⁶ *Rex v. Old Arlesford*, 1 T. R. 358.

may conceal. Thus, in an English case¹ in land demised by the plaintiff to a gas company there was found an ancient boat of rude construction, stated to be two thousand years old, which having been abandoned or left derelict by the original owners on the bank of a river, became, by the operation of natural causes, buried in the earth, and so remained for many centuries, until discovered and excavated by the gas company.² When discovered

¹ *Ewees v. Brigg Gas Co.*, 55 L. T. Rep. 881.

² Chitty J., said: In support of the contention that it was a mineral, reference was made to the case of *Hext v. Gill*, and to the statement in the judgment of Mellish, L. J. (with which James, L. J., concurred), that the term 'minerals' includes every substance which can be got from underneath the earth for the purpose of profit. The terms of this definition are wide enough to include the boat, but I am not aware that the term 'minerals' has ever been held to include anything but that which is part of the natural soil. Unquestionably coal is deemed in law a part of the natural soil without regard to what geologists may show to have been its origin. In law the natural processes by which the trees of a forest have become coal are not investigated, the result only is considered. But the boat has not become petrified or fossilized; it always has been distinguishable from the natural soil itself. If therefore I was required to decide the question I should hold that it was not a mineral. In support of the contention that it ought to be deemed in law as part of the soil in which it was imbedded, reference was made to the principle embodied in the maxim, *quicquid plantatur*, or as it is sometimes stated (see Broom's Legal Maxims, 6th ed., p. 376, n., and the judgment in *Climie v. Wood*, 18 L. T. Rep. (N.S.) 609 L. Rep. 3 Exchq. 257), *fixatur solo, solo cedit*. This principle is an absolute rule of law not depending on intention; for instance, if a man digs in the land of another and permanently fixes in the soil stones or bricks or the like as the foundation of a house, the stones or bricks become the prop-

erty of the owner of the soil, whatever may have been the intention of the person who so placed them there, and even against his declared intention that they should remain his property. Nor does it appear to me to be material that the things should have been placed there by the hand of man; it would seem to be sufficient if they have become permanently fixed in the soil by the operation of natural causes. In support of the contention that the boat always remained a chattel, it was or may be urged that though imbedded in the soil, it always was distinguishable from the soil itself, and preserved its original character of a chattel, which it certainly now is. Not long ago there was discovered, in the course of making excavation in Hampshire, a jar containing Roman coins, not gold or silver coins, and therefore not falling within the Royal prerogative of treasure trove; apparently the coins formed the small change of the treasure of a Roman legion. Could it be said that the jar or the coins were part of the soil within the principle referred to? Similarly a short time since there was found beneath the soil (I believe in Devonshire) a Roman lamp of ingenious construction made of lead, and in excellent state of preservation. A similar question may be asked of the lamp. But, as I have said, it is not necessary to decide these or the like interesting questions in the present case. The first question which does actually arise in this case is whether the boat belonged to the plaintiff at the time of the granting of the lease. I hold that it did, whether it ought to be regarded as a mineral, or as part of the soil within the maxim above cited, or as a chattel. If it was

the boat was lying embedded in the clay at a depth from the surface of four feet at one end and six feet at the other. It was about forty-five feet in length, hollowed out of a single oak tree; the wood had not become petrified or fossilized, but retained the properties of wood. The lease to the company contained a reservation of mines and minerals, and the lessees were authorized, under inspection of the lessor's surveyor, and according to plans previously approved; to erect a gas-holder and other buildings, and it was in the course of excavating for the foundations of the works that the boat was found. It was held that the boat, whether considered as a mineral, or as part of the soil in which it was embedded, or as still retaining the character of a chattel, was the property of the lessor and not of the lessees. If the premises leased are bounded on a non-navigable stream by the "present bank," the tenant stands in the same relation thereto,

a mineral or part of the soil in the sense above indicated, then it clearly belonged to the owners of the inheritance as part of the inheritance itself. But if it ought to be regarded as a chattel, I hold the property in the chattel was vested in the plaintiff for the following reasons: Being entitled to the inheritance under the settlement of 1856, and in lawful possession, he was in possession of the ground, not merely of the surface, but of every thing that lay beneath the surface down to the center of the earth, and consequently in possession of the boat. The principal of the decision of the court in *Reg. v. Rowe* (Bell's C. C. 93) appears to me to apply. There the question was whether the property in some iron lying at the bottom of a canal was well laid in the indictment in the canal company. The water had been taken out for the purpose of cleaning the canal, and the prisoner was indicted for stealing the iron which had been dropped into the canal by the owner. The court held that the canal company had a sufficient property in and possession of the iron to support the indictment. If the fact of the iron having been left on the surface of the ground covered by water was

sufficient to give in law, possession of the chattel to the person in possession of the land, it appears to follow *a fortiori* that the facts of this case justify me in holding that the plaintiff was in possession of the boat. For the boat was imbedded in the land; a mere trespasser could not have taken possession of it, he could only have come at it by further acts of trespass involving spoil and waste of the inheritance. *Blades v. Higgs*, 12 L. T. Rep. (N. S.) 615; 11 H. of L. Cas. 621; and *Holmes' Common Law*, title 'Possession,' p. 223. The plaintiff then being in the possession of the chattel it follows that the property in the chattel was vested in him. Obviously the right of the original owner could not be established; it had for centuries been lost or barred, even supposing that the property had not been abandoned when the boat was first left on the spot where it was found. The plaintiff then had a lawful possession, good against all the world, and therefore the property in the boat. In my opinion it makes no difference in these circumstances that the plaintiff was not aware of the existence of the boat."

that a grantor of the premises would stand, and is entitled to all accretions to the land by the receding of the stream.¹

SEC. 209. *Appurtenances—What pass as.*—The word “appurtenances,” so generally used in deeds and leases, is derived from the French word *appartenir*, to belong to, and signifies anything corporeal or incorporeal that is an incident of, and belongs to some other thing as principal. It was formerly thought that this word was of great importance in a conveyance, and that, without its use, the principal, only, would pass; but latterly, it has been held that its presence or absence in a deed or lease will not materially affect the grant, and that, as well without as with it, *everything that appertains or belongs to the principal* will pass,² and the true test as to whether a thing is

¹ Cobb v. Lavalley, 89 Ill. 331, 31 Am. Rep. 91; Middleton v. Pritchard, 8 Ill. 510; Lombard v. Kenzie, 78 Ill. 446; Chicago &c. R. Co. v. Stein, 75 Ill. 41; Braxton v. Bresler, 64 Ill. 448.

² Ogden v. Jennings, 62 N. Y. 526; Pyer v. Carter, 1 H. & N. 916; Pearson v. Spencer; Warthington v. Gimson, 2 E. & E. 618; Polden v. Bastard, 4 B. & S. 258. Yet, it is a word of large signification, and it would be impracticable to omit it from a grant, as it may sometimes be regarded as showing an intention to extend and enlarge its meaning and scope beyond its usual signification. Higgins v. Grant, Cro. Eliz. 18; Hurleston v. Woodroffe, Cro. Jac. 579; Anonymous, Owen, 31. In the case last cited, it was held that by a lease of a manor, “with all the lands to the said manor appurtenant,” the demesne land passes; but nothing but the manor place passes when the words are, “with all the lands appertaining to the said site.” So, an advowson appendant to a manor will pass under a demise of a manor, with the appurtenances. Higgins v. Grant, Cro. Eliz. 18; Hurleston v. Woodroffe, Cro. Jac. 519. Though by a demise of a prebend, together with all commodities, emoluments, profits, and ad-

vantages, with the appurtenances, an advowson belonging to the prebend will not pass, as the words commodities, emoluments, profits, and advantages, imply things gainful, which are contrary to the nature of an advowson generally. London v. The Chapter of the Virgin St. Mary of Southwell, Hob. 308. It is observable that the court made no allusion to the effect of the word “appurtenances.” A way not strictly appurtenant will not pass by the words “with all ways, roads, rights of road, paths, passages, &c., to the premises belonging, or in anywise appertaining,” unless the parties appear to have intended to use those words in a sense larger than their ordinary legal import. Barlow v. Rhodes, 1 C. & M. 439; see also Hinchcliffe v. Earl of Kinnoul, 5 Bing. N. C. 1. Hence it has become usual to insert the words “therewith used and enjoyed,” Morris v. Edgington, 3 Taunt. 27; Barlow v. Rhodes, 1 Cr. & M. 439, which, according to Kooystra v. Lucas, 5 B. & Ald. 330; Harding v. Wilson, 2 B. & C. 96; would pass a right of way used, at the time of granting the lease, with any part of the demised premises. The word “*belonging*” is construed as having the same sense as the word “*appertaining*”

an incident or appurtenance, seems to to be the propriety of relation between the *principal* and the *adjunct*, which is to be ascertained by considering *whether they agree in nature and quality, so as to be capable of union, without incongruity,*¹ and is actually and directly necessary to the full enjoyment of the property. "Upon the grant of a mill, every right necessary to its free and full enjoyment passes as an incident of the grant, and the necessity measures the extent and duration of the right. When the

when it immediately precedes or follows it. *Barlow v. Rhodes*, 1 C. M. 439, 445. But where a lease was made of a building, with all the rooms and chambers, with the appurtenances belonging, or in anywise appertaining thereto, it was held, that a room formerly occupied with the rest of the house, and with which it had communicated by means of a door, but which communication had been stopped by a wooden partition for many years before the time of the demise, did not pass. *Kerslake v. White*, 2 Stark. 508; *Pattison v. Hall*, 9 Cow. (N. Y.) 747; *Rood v. N. Y. & Erie R. R. Co.*, 18 Barb. (N. Y.) 80.

¹ Inst. 121 b. (7); id. 207, (17). The word "appurtenances" will pass only things which have been used together with the house or land demised, or which are reputed or accepted, as parcel thereof. *Smith v. Ridgeway*, 4 H. & C. 37; *Bryan v. Weatherhead*, Cro. Car. 17; *Maitland v. Mackinnon*, 1 H. & C. 607. But the mere fact that a thing, as a stable, which has no open communication with any other premises, has been used in connection with certain premises for a great number of years, does not necessarily make it a part of the premises so as to pass as an appurtenance, nor under the words "stables belonging." In order to have that effect, it must distinctly appear that the stables are parcel of the estate. *POLLOCK, C. B.*, in *Maitland v. Mackinnon*, ante. Land cannot be appurtenant to a building, in the strict sense of the term, but the word appurtenance may, in some cases, when used in a devise or lease, be read as "usually held, usually occupied or enjoyed therewith," when neces-

sary to carry the intention of the parties into effect. *Hill v. Grange*, Plow. 170; *Morris v. Edgington*, ante; *James v. Plant*, ante: 1 Shep. Touch. 94; *Ongley v. Chambers*, 1 Bing. 483. In *Higham v. Baker*, Cro. Eliz. 16, *ANDERSON* says: "That land shall pass as pertaining to a house which has been occupied with it for the space of ten or twelve years, for by that time it has gained the name of parcel or belonging, and shall pass with the house by that name in a will or lease." See, also, *Norton v. Webster*, 12 Ad. & El. 442. But where there is any restriction of the application of the general words, the rule is otherwise. *Meyrick v. Meyrick*, 2 C. & J. 283; *Gore v. Langton*, 2 B. & Ad. 680. Really, whether or not, anything is an appurtenance, is a matter of evidence. *Clement v. Burt*, 1 T. R. 704. So, a house, a curtilage, and a garden, may pass as appurtenant. *Bettisworth's Case*, 3 Coke, 82 a., or a right of turbary, *Salme v. Bullock*, 3 Lev. 165, but, generally, land will not. *Hearn v. Allen*, Cro. Car. 57; *Buck v. Norton*, 1 B. & P. 53. With land, a sheep-walk, *Hurleston v. Wood-rosse*, Cro. Jac. 519, a right of way, &c., *Morris v. Edgington*, 3 Taunt. 30; *Harding v. Wilson*, 2 B. & C. 96; *Hinchcliffe v. Kinnoul*, 5 Bing. N. C. 1; *Skull v. Glennister*, 16 C. B. N. S. 81, but not an easement that has become extinct or which does not exist in point of law, by reason of unity of ownership. *Plant v. James*, 5 B. & Ad. 794; *Barlow v. Rhodes*, 1 Cr. & M. 439; *Grymes v. Peacock*, 1 Bulstr. 17; *Clements v. Lambert*, 1 Taunt. 205; *Saunders v. Oleffe*, Moo. 467.

necessity ceases, the rights resulting from it, cease. A *mere convenience* is not sufficient to convey a right or easement, or impose burdens upon land other than those granted as incident to the grant.¹ The term "appurtenances" does not carry with it any right or interest in the lessor's premises outside the premises leased.² In a Mis-

¹ ALLEN, J., in *Ogden v. Jennings*, 62 N. Y. 531; *Holmes v. Seeley*, 19 Wend. (N. Y.) 507; *Nicholas v. Chamberlain*, Cro. Jac. 121; *Pierce v. Sellick*, 18 C. B. 321; *Oakley v. Stanley*, 5 Wend. (N. Y.) 523; *Voorhees v. Burchard*, 55 N. Y. 98; *Tabor v. Bradley*, 18 id. 109; *Wilson v. Hunter*, 14 Wis. 688. In *Tyringham's Case*, 4 Coke, 37 a., the rule in such cases was aptly expressed in the first resolution of the court, that "prescription doth not make a thing appendant, *unless the thing which shall be appendant agrees in quality and nature to the thing to which it shall be appendant*, as a thing corporate cannot be appendant to a thing corporate." *Hill's Case*, Plowd. 168 a. And, under this rule, land cannot be appendant to land, or meadow to a messuage. *Rolle's Abr.* 280; *Cole v. Haynes*, 22 Vt. 588; *Smith v. Martin*, 3 Saund. 400; *Ogden v. Jennings*, ante. Neither can a meadow be appurtenant to a pasture, *Comyn's Dig. Tit. Appendant (C.)*; *Rolle's Abr.* 280, nor a pasture to a wood or forest. *Id.* But a thing incorporate, as an advowson, may be appurtenant to a thing corporate, as, to a manor, but it is appendant to the demesnes of the manor, and not to the rent or service. *Dyer*, 70b.; *Comyn's Dig. Tit. Appendant*, B. 1, 8, and a thing corporate may be appurtenant to a thing incorporate. *Viner's Abr. Tit. Appendant (B.) pl. 8.* Thus, if a grant is made of an office, to which a house or lands belong, the house or lands pass with the office. 1 *Inst.* 49 a.; *Comyn's Digest, Appendant (B.)*; 1 *id.* 354. *Viner's Abr. Appendant B. pl. 8.* But from this, it must not be understood that everything incorporate can be appendant to a thing

corporate. Thus, common of turbary, (the right of digging turf from a common, or another's land,) cannot be appendant to land, but only to a house, "for," say the court, in *Tyringham's Case*, 4 Coke, 37 a., "the thing which is appendant ought to agree with the nature and quality of the thing to which it is appendant, and *turf* are to be spent in a house," and not upon land, *Wilson v. Willis*, 7 East, 124; *Comyn's Digest, Appendant (B.) 1*; 2 *Chitty's Pleading*, 390 n., and is confined to such a quantity, as is sufficient for the house to which the right is appendant, and it cannot be dug for sale, *Valentine v. Penny*, Nov. 145, or to repair banks, *Wilson v. Willis*, ante, or for making grass plots, *Wilson v. Willis*, ante; and by a grant of a house to which a right of turbary is annexed, the turbary passes. *Bacon's Abr. Common, (A.)* A right of common cannot be appendant to a church or chapel, for they are of several natures, and so, generally, as stated in the text, there can be no appurtenance to a thing unless the thing and the appurtenance agree in nature and quality; and not only must they agree in quality and nature, but there must also be a necessity for the appurtenance, to the comfortable or proper enjoyment of the premises granted, and they must also be connected with each other. The fact that a certain thing is necessary to the full enjoyment of the premises, and has always been used as a part of them, will not make it an appurtenance to the premises, *unless it is parcel thereof*. Thus, in *Ogden v. Jennings*, 62 N. Y. 526, which is a well considered case, an action of trespass was brought against the defendants for tearing

² *Bolton v. Bolton*, 11 Ch. Div. 968; *Leonard v. White*, 7 Mass. 6; *Way v. Draha*, 6 Neb. 1; 29 Am.

Rep. 353; *Grant v. Chase*, 17 Mass. 443.

souri case¹ it was held that in a lease of a hotel, a kettle sit-

down a fence, under the circumstances hereafter detailed. The defendants set up title to the *locus in quo*, in the trustees and inhabitants of School District No. 14, in the town of Virgil, and that they entered and tore down the fence by order of one of the trustees. It appeared that prior to 1839, the school-house had been erected, adjoining a highway. A rail fence had been constructed, commencing on the line of the highway, thirty-five rods north of the school and gradually diverging from the highway, passing in the rear of the school-house to a point ten rods south of the school-house. At the north end of the school-house this fence was thirty-two feet distant from the line of the highway. This strip of land between the highway and the fence was unenclosed. In 1839, one Jennings, who owned the land, executed to the trustees of the district a lease, a perpetual lease, of "all that certain piece or parcel of land, situate and being on lot 597, in the town of Virgil, and on the ground now occupied by the present school-district, for the sole and express purpose of a school-house, to have and to hold the said piece or parcel of land unto the said trustees," etc. In 1864, plaintiff, owning the adjoining land, and claiming to own the unenclosed strip north of the school-house, built a fence along the line of the highway to near the north line of the school-house, and from that point to the old fence. The defendants, inhabitants of the district, by the direction of one of the trustees, tore down this fence, which was the trespass complained of. It appeared by the evidence that the school children had been in the habit of using the unenclosed strip or portions thereof, as a play-ground. The court charged the jury, in substance, that it was for them to determine whether the *locus in quo* was intended to be conveyed, or was conveyed, as a necessary incident to the conveyance of the site of the school-house. That, if the property was necessary

to the ordinary and rational use of the property actually conveyed, and is clearly within the description, then it went with it and belongs to the school-house. The court declined to instruct the jury, as a matter of law, that the conveyance passed only the land on which the school-house stood, and the other buildings belonging thereto, and not the land *in quo*, or the use of it as a play-ground. The defendants had a verdict, which was sustained in consequence of the plaintiff's title, under the evidence, being insufficient to enable him to maintain the action. Otherwise the judgment would have been reversed, as is evident from the opinion of ALLEN, J., the portion of which bearing upon this question is subjoined. He said: "If this play-ground was not included within the description of the premises granted, the grant could not be enlarged by the necessities, actual or supposed, of the grantee. It is urged that if the reasonable necessity of these grounds was established, the case would be within the familiar rule, that by the grant or demise of a house or messuage, without further description, the curtilage and garden belonging to it passes with it as part and parcel of it, and as embraced within the more worthy name of the principal thing granted or demised. But only the garden, curtilage and close adjoining to the house, and on which the house is built, passes under the general description. Other lands, although occupied with the house, will not pass except particularly described. *Smith v. Martin*, 2 Saund. 400, and *n. 2*. A devise of a house, with its appurtenances or lands appertaining thereto, may have a more extensive effect and carry other land, depending upon the intent of the testator, as manifested by the entire will. *Blackburn v. Edgley*, 1 P. Wm. 600; *Doe v. Collins*, 2 T. R. 498; *Buck v. Newton*, 1 B. & P. 53; *Bodenham v. Pritchard*, 1 B. & C. 350. In a grant or demise, the addition

¹ *Barrett v. Bell*, 82 Mo. 100; 52 Am. Rep. 361.

uated on the lessor's adjacent property and used by him in connection with the hotel did not pass as an appurtenant, when not appurtenant to the hotel.¹ A water right, granted in gross, does not become technically appurtenant to land and a mill upon and for which it is subsequently used by the grantee thereof; but where such water-power is taken

of the word "appurtenances" will not vary the effect of the grant or extend it so as to include other lands not parcel of the house and close mentioned. *Bettisworth's Case*, 2 Coke, 516. The rule stated does not result from the necessity of a garden or curtilage to the reasonable occupation and enjoyment of the house, *but from the fact that they are regarded as in fact and in law parcel of it*, and as technically within the grant and the description of the thing granted. If a grant is made of a house, and there is no garden, curtilage, or close, annexed to and a part of it, the grantee cannot claim, as incident to the grant, a garden and curtilage, such as twelve men may say is reasonably necessary to the proper occupation and enjoyment of the house as a dwelling. Whether a garden is or is not necessary to a dwelling is wholly immaterial in interpreting and giving effect to a grant of the messuage, and determining what lands pass by the conveyance. So here, whether any or what extent of play-ground was convenient or necessary in connection with a school-house, was entirely immaterial in construing and determining the boundaries of the grant. It is also urged that, by reason of the reasonable necessity for these lands as a play-ground for the pupils, the title passed as "appurtenant," and under the clause "*cum pertinentes*," in the deed; and the cases in which easements "of necessity" have been sustained, are referred to by the court below, and the learned counsel for the respondents. The principle was carried in this case beyond the creation of a mere easement, and was made to effect a change of title to lands other than those included within the grant. It is well settled that, in a deed, the word appurtenances will not pass any corporeal real property,

or title to lands, but merely incorporeal easements, or rights and privileges. It cannot include a strip of land adjacent to that granted. A title to land will not pass by implication. *Jackson v. Striker*, 1 John. (N. Y.) Ch. 284; *Jackson v. Hathaway*, 15 John. (N. Y.) 447; *Buszard v. Chapel*, 8 B. & C. 141; S. C. 6 Bing. 150. The necessity of a proper head of water for the profitable operation of a mill, a millyard to a saw-mill, of a way of access in order to the occupation of any granted premises, is palpable, but the necessity of a play-ground or an open court, except for light and air, about a school-house, is not apparent. There was no evidence that appurtenances of that character were either usual or necessary for any purpose connected with the proper conduct of the school, or to the health or welfare of the children. That such appendages are not a universal necessity is very evident. Indeed, there was no evidence that a space for a playground was even a convenience for any proper school purpose. It, doubtless, may be a source of pleasure to the children, but that will not suffice to create an easement by implication, or as appurtenant to the granted lands. The law will not imply that a space of ground set apart for the exercise and diversion of the children is a necessity for a country school-house, or that for all recognized school purposes the district may not have and enjoy the school-house and premises fully without such an adjunct, and it would require very cogent evidence to establish a right to such grounds, as passing by implication, and as an incident to a conveyance of a school-house."

¹*Spalding v. Abbott*, 55 N. H. 423; *Ogden v. Jennings*, 62 N. Y. 526; *Johnson v. Jordan*, 2 Met. (Mass.) 234.

and applied to run a mill belonging to the owner of the power, and afterward, while the water-power is so being used, the owner conveys the premises by metes and bounds without mentioning the water right, the right may pass therewith, as parcel thereof, if such appears to have been the intention of the parties. Thus in 1864 a water right was granted by the owner of the basin at Oregon City, in gross; and in 1866 the same was taken and applied to the use of a paper mill and machine shop on block 2, in said town; and in 1867, the same being the property of the owners of the water-power, they converted it into a flour mill and applied such water-power to the use thereof, continuously and exclusively, until 1878, when the owner of the mill and power conveyed the mill, describing the property by metes and bounds only, and without any express mention of said water right, to secure a loan of \$20,000, payable in two years, with interest at the rate of one cent per month; the said property, including said water right being then worth not to exceed \$25,000, of which sum the water right was worth one-third. It was held that upon the facts and circumstances of the case, it satisfactorily appeared that it was the intention of the parties that the water right should pass with the land and mill, and being then used in connection therewith, it did so pass as parcel thereof.¹

A demise of a house and garden described the premises by boundaries which strictly would include a portion of a piece of ground at the back and adjoining the garden, which was laid out as a common walk for a row of houses; it was held, that this portion of the common walk was included in the premises demised, though by the lease a right was granted to the lessee of the use of the whole of the common walk.²

¹ Bank of British North America v. Miller, 6 Fed. Rep. 545; Hart v. Curtis, 7 Met. (Mass.) 94; Linthicum v. Ray, 9 Wall. (U. S.) 242; Ackroyd v. Smith, 16 C. B. 184; Dewitt v. Harvey, 4 Gray. (Mass.) 487; Garrion v. Rudd, 19 Ill. 558; Goodrich v. Burbank, 12 Allen, (Mass.) 459; Nicholas v. Chamberlain, 3 Cro. 121; Whitney v. Olney,

3 Mas. (U. S. C. C.) 280; United States v. Appleton, 1 Sum. (U. S. C. C.) 500; Thayer v. Payne, 2 Cush. (Mass.) 327; Strickler v. Todd, 1 S. & R. (Penn.) 63; 13 Am. Dec. 649; Coolidge v. Hager, 43 Vt. 9; 5 Am. Rep. 256; Sheets v. Selden, 2 Wall. (U. S.) 186.

² Curling v. Mills, 6 M. & G. 173.

The demise of a house "with the appurtenances" will pass the house, with the orchards, yards and curtilage and gardens, but not the land, especially if it be at a distance, though occupied with the house: so the demise of a house "appurtenances" will not pass an adjoining building not accounted parcel of the house, although held with it for thirty years.¹ So a stable will not pass under the renewed lease of a messuage with the appurtenances, which was not originally demised therewith and actually forms no part thereof.² In one case it was held, that a grant of a house with the appurtenances would pass land that was occupied with the house; it should not, however, be overlooked that the point arose on a special verdict, *in which the house and land were found to be all one.*³ Generally speaking, land will not pass as appurtenant to a house, but it may sometimes do so, *to effectuate the obvious intention of the parties.*⁴ Whether the thing claimed as appurtenant is a part of the premises or not must be gathered from the evidence: thus, where there is a conveyance in general terms of all that acre called Blackacre, everything which belongs to Blackacre passes with it; but whether parcel or not of the thing demised is always matter of evidence: ⁵ so a demise of premises, late in the occupation of A (particularly describing them), part of which was a yard, was held not to pass a cellar situate under the yard, which was then occupied by B, another tenant of the lessor; for though *prima facie* the property in the cellar would pass by the demise, yet that might be regulated and explained by circumstances.⁶ Under a demise of a building, with all rooms and chambers, and the appurtenances thereto belonging, is to be understood all that is occupied together as an entire building at one and

¹Bryan v. Wetherhead, Cro. Car. 17.

²Maitland v. Mackinnon, 1 H. & C. 607.

³Gennings v. Lake, Cro. Car. 169.

⁴Hill v. Grange, Dyer, 130 b;

Baudeley v. Brook, Cro. Jac. 189;

Bearn v. Allen, Cro. Car. 57;

Walker v. Walker, 3 B. & P. 375; Buck d. Whalley v. Nurton, 1 B. & P. 53, cited 5 C. B. N. S. 463.

There are cases both ways, per WILLIAMS, J., 7 C. B. 714.

⁵Cole Ejec. 240.

⁶Freeland v. Burt, 1 T. R. 701; Press v. Parker, 2 Bing. 456.

the same time ; therefore, such a demise will not comprehend a room which had once formed part of the building, but which had been separated from it by means of a wooden partition, and had not been occupied with it for many years previous to the demise.¹ A right of way or other easement (as to cut turf, &c.), will pass by a demise with the appurtenances.² Where premises are granted or leased,³ with windows opening out upon a vacant lot

¹ *Kerslake v. White*, 2 Stark. 508.

² *Dobbyn v. Somers*, 13 Ir. C. L. 298 ; *Skull v. Glenister*, 16 C. B. N. S. 81.

³ *Myers v. Gemmel*, 10 Barb. (N. Y.) 587 ; *Mullen v. Strickler*, 19 Ohio St. 185 ; *Wood on Nuisances*, p. 153, et seq. There are instances in which a right to have the light and air enter the windows of a building over an adjoining lot, may exist : First, by express grant, *Hills v. Miller*, 3 Paige's Ch. (N. Y.) 254 ; *Western v. McDermott*, 1 L. R. (Eq. Ca.) 499 ; *Jones v. Jenkins*, 34 Md. 1 ; *Thurston v. Mink*, 32 id. 487 ; *Brooks v. Reynolds*, 106 Mass. 81 ; *Morrison v. Marquardt*, 24 Iowa 35 ; *Boyce v. Guggenheim*, 106 Mass. 201 ; *United States v. Appleton*, 1 Sumn. (U. S.) 492 ; *Kent's Com.*, vol. 3, p. 448, and secondly, by implied grant. *Thurston v. Mink*, 32 Md. 487 ; *Jones v. Jenkins*, 34 id. 1 ; *Lampman v. Milks*, 21 N. Y. 505 ; *Oregon Iron Co. v. Trullinger*, 3 Oregon 1 ; *Story v. Odin*, 12 Mass. 157 ; *Morrison v. Marquardt*, 24 Iowa, 35. Where a landowner erects a house with windows opening upon the portion of his lot adjoining, and sells the house and the lot upon which it stands, and by the terms of the conveyance covenants not to make any erection upon the adjoining lot that will hide either the light or prospect, this will create a right in the owner of the house and his guaranties against the grantor and his grantees to such light and prospect, and any infringement thereof would be a nuisance. *Hills v. Miller*, 3 Paige's Ch. (N. Y.) 254. So, too, when the grant by fair construction can be extended to cover such rights. In *Hills v. Miller*, ante, the plaintiff purchased of the defendant a part of a village lot of four acres in

the village of Auburn, and erected a valuable dwelling-house thereon. The defendant Miller retained the balance of the lot. Miller purchased the premises of one Bostwick, and at the time of the conveyance to Miller, Bostwick agreed with him that no building should ever be erected upon a small triangular piece of land owned by him on the east side of Hotel street, at the junction of that and South street, and directly opposite the lot conveyed, and executed a bond to Miller with a penalty, for the faithful performance of the agreement. Miller caused both the deed and bond to be recorded, and afterward sold a part of the premises to the plaintiff, informing him, before the purchase, of the existence of the bond and its provisions. Eight years after the purchase by the plaintiff, the defendant, and the executors of Bostwick's estate, gave a quit-claim deed of this triangular piece of land to the Baptist Church and Society, who proceeded to extend their church over the same. *WALWORTH, C.*, in disposing of the question, held that the execution of the bond at the same time the deed was executed was, to all intents and purposes, one transaction, and had the same effect as though expressed in the same conveyance, and, that thereby a servitude was imposed upon the triangular strip of land, which inured to the benefit of any purchaser under Miller's title, and that this servitude could not be removed by Miller, as against his grantees. Easements to light, by implied grant, may be acquired, but the doctrine, in the different States, seems to be very conflicting. In some States the right is wholly denied. *Mullen v. Strick-*

detached from the premises, a grant of the right to have the light and air enter the premises through them, is not

19 Ohio St. 185, while in others it is made to depend upon the question of necessity, Oregon Iron Co. v. Trullinger, 1; Morrison v. Marquardt, 24 Iowa, 85; Lampman v. Milks, 21 N. Y. 505; Story v. Odin, 13 Mass. 157, and in none of them is the right upheld as a mere convenience of the granted premises. Washburn on Easements, 618. The weight of authority would seem to support the doctrine, that, where A, being the owner of land, erects a house thereon with windows opening upon his vacant land adjoining, and sells the house, reserving the adjoining lot, that this does not create an easement in the purchaser of the house to have the light and air come through those windows, unless the easement is necessary to supply the building with light, and to its comfortable enjoyment. Currier's Co. v. Corbet, 2 D. & S. 380; Biddle v. Ash, 2 Ashm. (Penn.) 211; Booth v. Alcock, 8 L. R. (Eq. Ca.) 693; Durel v. Boisblanc, 1 La. An. 407; Jackson v. Duke of Granville, 3 DeG. J. & S. 275. The ground upon which this easement by implied grant is predicated, is analogous to that by which a right of way by necessity is created. If there is no other mode of supplying light to the building, as constructed by the vendor, except through those windows, and it is essential to its reasonable enjoyment that the light and air should come through them over the adjoining lot, the law will raise an easement to that extent in favor of the grantee of the house, against the grantor and his assigns. U. S. v. Appleton, 1 Sum. (U. S.) 492. So, too, where from a fair construction of the grant, such an easement can be implied, the law will sustain it as incident to the land, but the mere fact that the grantor of premises is also the owner of the adjacent land upon which the windows of the granted premises open, is not, of itself, sufficient to create or uphold such an easement, unless it is necessary to the comfortable and reasonable enjoyment of the premises. Paine

v. Barton, 4 Allen (Mass.) 169; Brooks v. Reynolds, 106 Mass. 31; Carrig v. Dee, 14 Gray (Mass.), 583; Curry v. Stein, 11 Md. 1; Napier v. Bulwinkle, 5 Rich. (S. C.) 811; Lampman v. Milks, 21 N. Y. 505; Biddle v. Ash, 2 Ashm. (Penn.) 211. As to what language or condition of things will raise such an easement by implication, must necessarily depend upon the circumstances of each case. In Collier v. Pierce, 7 Gray (Mass.) 18, the premises of the plaintiff and defendant were sold at auction the same day. The plaintiff's lot was bid off first, and his deed was prior in point of time to that of the defendant. The piece purchased by the plaintiff had a house upon it, with windows opening upon the lot purchased by the defendant, and received light and air over that lot. There was no reservation of, or reference to, light and air in either conveyance. The defendant darkened the plaintiff's windows. In an action therefor the court held that the sale by auction could not be treated as a grant by a proprietor of his estate, retaining to himself another part, but was rather in the nature of a partition, and, as it did not appear that the light through the windows in question was necessary to the convenient enjoyment of the plaintiff's premises, the easement could not be regarded as passing by construction. See Royce v. Guggenheim, 106 Mass. 201. In Myers v. Gemmel, 10 Barb. (N. Y.) 537, the defendant leased to the plaintiff a dwelling house opening out upon a vacant lot, also belonging to him, over which the light and air had been accustomed to come into the house. While the tenant was in possession of the premises, the defendant erected a building upon this vacant lot, occupying the whole space between the lot and the dwelling, and darkening all the windows on that side of the house. The court held that this was not an actionable injury, and was not in derogation to the defendant's grant, because the law does not attach a right of enjoyment of light as an

implied; but it has recently been held by the Court of Appeals in New York, that where a lease is made of a part of a building, with a window opening into a yard connected with the building, so that if the lessee had leased the whole building the yard would have passed as an appurtenance to the building, the tenant acquires a right to have the window left unobstructed, at least when it is *necessary* for the use of the premises for the purposes for which they were let.¹

incident to the occupation of a house, unless it exists in the form of dedication to groups or collections of houses so as to partake of the nature of a public easement. But the court intimates that if houses were erected around a court, with an open space for light and air, with a common entrance, and open for all the tenants, that this would be held as a dedication for the benefit of all the tenants. In *Maynard v. Eahler*, 17 Penn. St. 222, the court held that where two estates are conveyed at the same time, to different purchasers, no easement is acquired in favor of either estate for the passage of light and air; *but*, that a person selling a house which opens out upon a vacant lot, also belonging to him, would be estopped from making an erection upon the lot that would obstruct the passage of light and air to the dwelling. In *Morrison v. Marquardt*, 24 Iowa 35, the court held that an easement of this character cannot be imposed upon an adjoining lot of the grantor, by implication. That in order to set up such an easement, it must arise from express grant, yet, the court intimated that a condition of things might exist, from which such an easement might be implied. In *Mullen v. Strickler*, 19 Ohio St. 135, the plaintiff and defendant were the owners of adjoining houses separated by a narrow strip of land five feet in width, both deriving title from the same source, and upon the same day, the plaintiff's conveyance being first in point of time. The windows of the plaintiff's house opened out upon this space, and the house received all its light therefrom, although it appeared that windows might be

placed in other parts of the house, and light thus obtained, but that the expense would be considerable. The plaintiff's title extended only to the outer wall of his house on this space; and the defendant proceeded to fill in the space and completely shut off the light from the plaintiff's windows, and darkened his house. In an action to recover for the injury, the court held that no action would lie. That in the absence of an express grant, no easement existed in favor of the plaintiff's house to the light and air over this space. *That such an easement could not be implied.* In Maryland, *Jones v. Jenkins*, 34 Md. 1; *Thurston v. Mink*, 32 id. 487, such an easement is raised by implication, and the rights of the parties are treated as fixed at the time of severance, and all *apparent* and *continuous* easements, of which light is held to be one, are treated as passing by implication, unless excluded in the grant itself. From what has been said, it will be seen that the question as to whether a right to have the light and air enter through the windows of a house passes by implication is not uniformly settled.

¹ *Doyle v. Lloyd*, 64 N. Y. 432.

In this case it appeared that on the 26th day of July, 1870, Ann Gillett owned a building, No. 85, on Forsyth street, in the city of New York, five stories high, twenty-five feet wide on the street, and fifty-one feet deep, upon a lot twenty-five feet wide and seventy feet deep. The lower story was then occupied as a store, and the upper stories by families. The space of nineteen feet in the rear of the building was a vacant yard, with the exception of privies there-

When the right to have the light and air enter the

on, having no communication with any street, and then, apparently, useful for no purpose except as appurtenant to the building. There was a hall-way on the southerly side of the building, extending the whole length thereof, with a door at each end, giving access to the yard; and there was then a door from the lower story into this hall-way, and also in the rear of the store into the yard. There were also two windows in the rear of the store, from which light and air entered the store. The privies were manifestly built to be used with the building, and for the accommodation of its tenants; and we must assume, if it is material, as plaintiffs offered to prove it upon the trial, that the tenants had access to the vacant space and to the privies. While the privies were in this condition, on the day above mentioned, Mrs. Gillett rented the store on the first floor, with the appurtenances, to the plaintiffs, to be occupied as a dry goods store for the term of five years from the 1st day of May, 1871. The plaintiffs then bought out the prior tenant, and immediately took possession, and continued in the possession of the store down to the trial of this action. At the time of the lease, the plaintiffs occupied a store on the southerly side of Grand street, a street running east and west, at right angles with Forsyth street, and the rear of that store butted against the rear half of the northerly wall of the Gillett store, and it was agreed that the doors opening from the store into the hall-way and yard should be bricked up to make place for shelves in the store, and that an opening should be made in the northerly wall of the Gillett store and the rear wall of plaintiffs' store, so as to make a communication between the two stores. The plaintiffs did not use the privies on the Gillett lot, as they had one in their own store convenient for use for both stores. On the 1st day of May, 1874, the defendants took a lease of the whole building and lot No. 85, Forsyth street, for ten years, subject to plaintiffs' lease, and commenced to excavate in the

yard for the purpose of building thereon, and then plaintiffs commenced this action to restrain them. "If," said EARL, J., in a very able opinion, "the plaintiffs had hired the whole building with the appurtenances, their right to the yard could not have been questioned. The yard belonged to the building, and was appropriated to its use, and would pass under a lease of the building as a part of the premises demised. The lease would have such effect, because it would be the presumed intention of the parties. In Sheppard's Touchstone (94) it is said that the grant of a messuage, or a messuage with the appurtenances, will pass the dwelling-house, barn, adjoining buildings, orchard, curtilage and garden. In Comyn's Digest (title, Grant, E. 6) it is said 'by the grant of a messuage or house, the garden, orchard or curtilage pass.' In Whitney v. Olney, 3 Mas. (U. S. C. C.) 208, it was held that a devise of a mill with appurtenances, conveyed not the buildings merely, but the land under and adjoining which is necessary to the use, and actually used with it. In United States v. Appleton, 1 Sum. (U. S.) 402, Judge STORY said: 'The general rule of law is, that where a house or store is conveyed by the owner thereof, everything then belonging to and in use for the house or store, as an incident or appurtenance, passes by the grant. It is implied from the nature of the grant, unless it contains some restriction, that the grantee shall possess the house in the manner and with the same beneficial rights as were then in and belonged to it.' In the case supposed, the yard would have passed with the store, not by force of the word 'appurtenances,' but as portions of the premises demised. Riddle v. Litchfield, 53 N. H. 503. If all the rooms in the building had at the same time been rented to different tenants, each taking his room with the appurtenances, and no mention had been made of the yard, a different case would have been presented. The demise of a room in the build-

premises through certain windows, exists, any interfer-

ing would pass no portion of the yard. Each tenant would take only the room which he hired, and would take no other portion of the premises. Whatever else he took would be by virtue of the word 'appurtenances.' That word would give him whatever was attached to or used with the premises, as incident thereto, and convenient or essential to the beneficial use and enjoyment thereof, and he would take any easement or servitude used or enjoyed with the demised premises. 2 Wash. on Real Prop. 667; Wash. on Eas. 32; Sheets v. Selden's Lessee, 2 Wall. (U. S.) 177; Riddle v. Litchfield, *supra*; Voorhees v. Burchard, 55 N. Y. 98; Huttemeier v. Albro, 18 id. 48. It would not give him an interest in the yard as a portion of land demised, because land cannot pass as appurtenant to land, but it would give him an easement in the yard in common with all the other tenants, for all purposes for which it could be used in common—for access to the privies, for play-ground for children, and for light and air for rooms in the rear of the building. If the different rooms in the building were leased at different times with the appurtenances, the same result would follow. Each tenant would have an easement in the yard. Such, in the absence of restrictive words, would be the manifest intention of the parties, and no rule of law stands in the way of giving effect to such intention. The yard was attached to and appropriated for the use of the building. The privies were built for the use of the occupants of the building, and the yard was essential to the beneficial use thereof, and as the building was occupied when plaintiffs took the lease, no tenant thereof could well dispense with the use of the yard. The building was so constructed and arranged that all the tenants had access to the yard, and there was no other apparent purpose to which the yard could be subjected. Hence, within every authority to which our attention has been called, the plaintiffs, when they took their

lease, acquired an easement in the yard, unless facts to which I will now call attention, deprive them thereof. It was agreed between them and their lessor at the time they took their lease, as above stated, that the doors leading from their store into the yard and into the hall-way should be closed up at the expense of the lessor. This agreement was not for the benefit of the lessor, and was not made to cut off any rights which the lessees would otherwise have, but it was made at the request of the lessees and for their benefit, to give them more room for shelves. Having a privy in their own store on Grand street, so long as they used the two stores together, they did not need the use of a privy in the yard. But they did nothing and agreed to nothing depriving themselves of the right to use the privies. They still had access to the yard. There was the hall running the whole length of the south side of the building, with a door opening into the yard at the rear end. This was a way leading into the yard, and in the absence of any restriction all the tenants had the right to use it for access to the yard. The plaintiffs could at any time have had access to the yard and privies through this hall, and could have used them in common with the other tenants. But even if it should be held that the fact of closing up the doors, and the fact that plaintiffs had a privy of their own, showed that it was not the intention by the lease to give them access to the yard, yet *there is nothing to indicate that they were to be deprived of the light and air from the yard.* They hired the lower story for a store and the windows were the only means to procure light (except artificial) for the proper transaction of the business of the store. *The light passing into the windows from the yard, was essential to the beneficial use of the store, and it was clearly the intention at the time the lease was made that the plaintiff should have it. To this extent, in any view of the case, the plaintiffs were entitled to enjoy an easement in the yard.*"

once therewith or obstruction that causes *material* inconvenience to the lessee, in the ordinary occupations of life, is actionable.¹ Under a lease of premises, "together with all ways appertaining or with any parts thereof used or enjoyed," any way *used with the premises* will pass, whether expressly mentioned or not.² But, generally, a

¹ Clarke v. Clarke, L. R. 1 Eq. Cas. 295; Johnson v. Wyatt, 2 De G. J. & S. 18; Isenberg v. East India Co., 12 W. R. 450. Slight inconvenience is not actionable. "I should not think," says CRANWORTH, L. C., in Yates v. Jack, L. R. 1 Eq. Cas. 298, "that the defendant had established his defence, unless he had shown that for whatever purpose the plaintiff might wish to employ the light, *there would be no material interference with it.*" Where, however, such a right is acquired, whether by grant or otherwise, the fact that, by reason of changes in the situation of surrounding property, enough light is received, so that the light coming over the servient estate can be dispensed with, does not in any measure affect the right of the owner of the dominant estate to have the light come to him over the servient estate. Wood on Nuisances, 159. He is entitled to the light from that point *in addition thereto*. The rule is, that the owner of the servient estate cannot interfere with the rights of the owner of the dominant estate in any manner *so that the light will be essentially diminished from that quarter*, without any reference to the increase of light by changes in other surrounding property. Dyer's Co. v. King, L. R., 9 Eq. Cas. 498; Straight v. Burn, L. R., 5 Eq. Cas. 16. See Wood on Nuisances, pp. 151-159, for a full review of the cases.

² Whalley v. Thompson, 1 B. & P. 371; Barlow v. Rhodes, 1 Cr. & M. 430; Koagstree v. Lucas, 5 B. & Ald. 880; Breed v. Cunningham, 2 Cal. 361; Kermuller v. Pratz, 18 Iowa, 352; Brown v. Thissell, 6 Cush. (Mass.) 254; Gayetty v. Bethune, 14 Mass. 49; Grant v. Chase, 17 Mass. 448; Combs v. Stewart, 10 B. Mon. (Ky.) 468; Dubuque v. Maloney, 4 Iowa 450; Wilson v. Bagshaw, 5 M. & K. 448;

Morris v. Edgington, 8 Taunt. 24; Worthington v. Gimson, 2 E. & E. 624; Crisp v. Price, 5 id. 548; Staple v. Heydon, 6 Mod. 1. In James v. Plant, 4 Ad. & El. 749, the court held that the words "*belonging or appertaining or therewith usually held, used, occupied or enjoyed, * * and their appurtenance,*" were sufficient to embrace and convey a right of way which had been usually held, &c., with the principal estate. See Bro. Abr. Tit. Extinguishment, pl. 15, as to the revival of an easement that had been extinguished by a unity of possession of the dominant and servient estate in the same person, upon severance; also Thompson v. Whalley, 1 B. & P. 371, where a way had been enjoyed from close A over close B, the same person being seized of both. He devised his estate in close A "*with the appurtenances*"; and it was held that the right of way did not thereby pass, for that the word "*appurtenances*" in the will had nothing to operate upon. The words of the will there did not testify the intention to pass the right of way. But, "if a man seized of Blackacre and Whiteacre, uses a way through Whiteacre to Blackacre, afterwards grants Blackacre, with all ways, &c., this way through Whiteacre shall pass to the grantee." Com. Dig. Chimin. (D. 3). In Clements v. Lambert, 1 Taunt. 205, where common appurtenant to premises had been extinguished by unity of possession, the party seized conveyed the premises with all common and appurtenances thereto belonging or in anywise appertaining; and this was held not to convey a new right of common; but it seems admitted there that, if the deed had contained such words as "*used with the said messuage,*" the common, if shown to have been in fact so used, would have passed. Morris

right of way does not pass under the word "appurtenances,"¹ except it be a way of necessity.² Under an

v. Edgington, 3 Taunt. 24. Where the landlord demised part of his premises, with certain rights of ingress, &c., and "all other ways and easements to the said demised premises belonging and appertaining"; and these latter words were held to pass a right of way on the grantor's own premises, which the grantor had himself used for access to the premises demised, *MANSFIELD, C. J.*, relying upon the intent of the grantor as shown by the circumstances of the case. The principle, that in such a case the intent must be consulted, was recognized in *Barlow v. Rhodes*, 3 Tryw. 280. In *Thompson v. Waterlow*, L. R., 6 Eq. Cas. 36, the doctrine of *James v. Plant*, ante, was reviewed by the Master of the Rolls under the following state of facts: The grantor owned two adjacent lots, A and B, and had been accustomed to cross B for agricultural purposes to reach A, in a way which was indicated by use, and had gates for entering and leaving the close B. He then sold A, "with all ways now or heretofore occupied or enjoyed," &c. The purchaser, under the ruling in *James v. Plant*, claimed a right of way across B as appurtenant to the close A. But the court held that, in the present case, as both lots had always belonged to the grantor until the sale made, there never could have been a technical right of way in favor of one lot over the other. And the distinction between the cases was, that, in the one, there had once existed a right of way in favor of one parcel over the other, which had been suspended or merged by the unity of both parcels in the same owner, and when he conveyed the former dominant parcel with "ways heretofore occupied, &c.," he spoke of something which had existed, and intended to revive it by his grant. Whereas in the present case, if these words were held to create a new right, and such a right as the grantor himself had, it would give the owner a right to go wherever he pleased over and across the

close B. But where the easement of a way over an estate in favor of another is extinguished by the unity of title of the two in the same owner, and he then devised what had been the dominant estate, "*with its appurtenances*," it was held not to revive the way over the other estate, because by "appurtenances" must be understood existing rights.

¹ *Plimpton v. Converse*, 42 Vt. 712; *Worthington v. Gimson*, 2 E. & E. 618; *Clements v. Lambert*, 1 Taunt. 205; *Grant v. Chase*, 17 Mass. 443; *Pheysey v. Vicary*, 16 M. & W. 448; *Ackroyd v. Smith*, 9 C. B. 689. In *Motes v. Bates*, 74 Ala. 874, the lessee of rented lands which are accessible from the public road, has no right to use a shorter route across the other lands of the lessor without his permission, express or implied; and if such permission can be implied from his use of the shorter route without objection, it is only a parol license and revocable at pleasure; and after revocation by express prohibition or warning, the further use of the shorter route by either the lessee or his tenants and servants, is a trespass.

² *Pheysey v. Vicary*, ante; *Hinchcliffe v. Kinnoul*, 5 Bing. N. C. 1. "The only thing that would pass," said *PARKE, B.*, in the case first cited, "by the word appurtenances, as used in this will, would be a way of necessity," and on a previous page, 494, he says: "I find no authority to show that the word appurtenances in a will has a different meaning from that term in a deed." See also *Plimpton v. Converse*, ante; *Platt v. James*, 5 B. & Ald. 830. *Appurtenances* as applied to easements, which pass by grant as an adjunct of the principal estate, are either old existing rights or such as have been created by express grant. In *Polden v. Bastard*, 4 B. & S. 264, *CROMPTON, J.*, in reference to a claim of an easement in a pump upon one estate in favor of another, said: "This is not a *continuous* easement, nor an easement belonging to the cottage, but a mere enjoy-

under-lease which described the road demised and the ways demised as "all ways thereunto appertaining," it was held, that this did not pass a right of way over the original lessor's soil.¹ There is a distinction between easements that are *continuous* in their nature and *apparent*, and those which are not so. The former pass by a demise or conveyance, whether named or not, while the latter do not.² Thus the right to use a drain, or a pump

ment for two years by the tenant, of the privilege of using the pump. *If this had been an old easement attached to the cottage it would pass by the words "appertaining and belonging,"* otherwise, in order to pass it, it should have been expressly conveyed. See also *Cocheco Mfg. Co. v. Whittier*, 10 N. H. 305.

¹ *Harding v. Wilson*, 2 B. & C. 96.

² *Pearson v. Spencer*, 1 B. & S. 571; *Polden v. Bastard*, 4 B. & S. 258. In the one case, the right depends upon a positive grant of the soil, and in the other upon a presumed grant. In the case of a grant of the soil, the conveyance, if unqualified, carries with it all that is annexed thereto, as well as all easements *necessary* to the proper enjoyment of the property, which are apparent, or of such a character as to be discerned upon an inspection of the property, while in the case of a presumed grant, nothing is acquired what is strictly in accordance with the uses with which it is claimed, and this presumption never attaches, except when it finds reasonable support from all the circumstances attendant, not only upon the user, but upon the thing claimed. In *Pyer v. Carter*, 1 H. & N. 916, the plaintiff and defendant were the owners of adjoining tenements which had formerly belonged to one person, and been used as one house, but which he divided and made into two. In July, 1853, the owner of the whole tenement conveyed the defendant's house to him in fee, and in September of the same year conveyed the plaintiff's house to him. No reservation of an easement was contained in either conveyance. At the time of the conveyance a

drain or sewer ran under the plaintiff's house and thence under the defendant's house, and discharged itself into a common sewer. The defendant obstructed this drain, and wholly prevented the flow of waters through it where it entered his house, and as a consequence in every rain storm the defendant's house was flooded. The defendant was not aware of the existence of the drain at the time of the conveyance to him, and the plaintiff might have constructed a new drain from his house to the common sewer for a small cost. Upon these facts a verdict was entered for the plaintiff by the direction of the court, and upon hearing in *Exchequer* the verdict was sustained, and as the case is one of importance and of general interest to the profession, and not readily accessible, I give the opinion of *WATSON, B.*, in full. He said: "This was an action for stopping a drain that ran under both the plaintiff's and defendant's houses, taking the water from both. The cause was tried at Liverpool, before Baron *BRAMWELL*, when a verdict was entered for the plaintiff, and a motion was made to enter a verdict for defendant in pursuance of leave reserved at the trial. The plaintiff's and defendant's houses adjoined each other. They had formerly been one house, were converted into two houses by the owner of the whole property. Subsequently the defendant's house was conveyed to him, and after that conveyance the plaintiff took a conveyance of *his* house. At the time of the respective conveyances, the drain ran under the plaintiff's house, and then under the defendant's house, and then discharged itself into the common sewer. Water from the eaves of

upon the premises, passes without any words conveying

the defendant's house fell on the plaintiff's house, and then ran into the drain on plaintiff's premises, and thence through the drain into the common sewer. The plaintiff's house was drained through this drain. It was proved that by the expenditure of 6*l.* the plaintiff might stop the drain, and drain directly from his own land into the common sewer. It was not proved that the defendant at the time of his purchase knew of the position of the drains. Under these circumstances we are of opinion, upon reason and upon authority, that the plaintiff is entitled to our judgment. We think that the owners of the plaintiff's houses are, by implied grant, entitled to have the use of this drain for the purpose of conveying the water from his house, as it was used at the time of the defendant's purchase. It seems in accordance with reason that where the owner of two or more adjoining houses sells and conveys one of the houses to a purchaser, that such house in his hands should be entitled to the benefit of all the drains from his house, and subject to all the drains thus necessarily used for the enjoyment of the adjoining house, and that without express reservation or grant, inasmuch as he purchases the house such as it is. If that were not so, the inconveniences and nuisances in towns would be very great. Where the owner of several adjoining houses conveyed them separately, it would enable the vendee of any one house to stop up the system of drainage made for the benefit and necessary occupation of the whole. The authorities are strong on this subject. In *Nicholas v. Chamberlain*, Cro. Jac. 121, it was held by all the court that 'if one erects a house and builds a conduit thereto in another part of his land, and conveys water by pipes to his house, and afterwards sells the house with the appurtenances, excepting the land, or sells the land to another, reserving to himself the house, the conduit and pipes pass with the house, because it is necessary and quasi appendant thereto, and he shall have liberty

by law to dig in the land for amending the pipes or making them new, new, as the case requires. So if a lessee for years of a house and land erects a conduit upon the land, and after the term the lessor occupies them together for a time, and afterwards sells the house with the appurtenances to one, and the land to another, the vendee shall have the conduit and the pipes, and the liberty to amend them.' *Shury v. Pigott*, Popham, 166; S. C., 8 Bulst. 339; and the case of *Coppy v. I de B.*, 11 Hen. 7; 25 Pl. 6, support this view of the case, that where a gutter exists at the time of the unity of seizin of adjoining houses it remains when they are aliened by separate conveyances, as an easement of necessity. It was contended, on the part of the defendant, that this pipe was not of necessity, as the plaintiff might have obtained another outlet for the drainage of his house at an expense of 6*l.* We think that the amount to be expended in the alteration of the drainage, or in the constructing a new system of drainage, is not to be taken into consideration, for the meaning of the word 'necessity' in the cases above cited and in *Pennington v. Galland*, 9 Exchq. 1, is to be understood the necessity at the time of the conveyance, and as matters then stood, without alteration; and whether or not, at the time of the conveyance, there was any other outlet for the drainage water, and matters as they then stood, must be looked for at the necessity of the drainage. It was urged that there could be no implied agreement unless the easement was apparent and continuous. The defendant stated he was not aware of this drain at the time of the conveyance to him; but it is clear that he must have known or ought to have known that some drainage then existed, and if he had inquired, he would have known of this drain; therefore it cannot be said that such a drain could not have been supposed to have existed; and we agree with the observation of Mr. GALE (*Gale on Easements*, p. 53, 2nd ed.) that by 'apparent signs' must be un-

the right, but the right to use a pump, or a way of *adjoining* grounds, does not pass unless expressly named.¹ As to easements, what are, and what pass under a lease, see "*EASEMENTS.*"

SEC. 210. *Formalities required in the several States.*—In most of the States, provision is made by statute for the leasing of lands, both as to the necessity of a deed or other writing and the formalities to be observed in their execution, *and in all cases these requirements must be observed* or the lease will be inoperative to convey the estate designated. But, even where an instrument is inoperative, *or void as a lease*,² it may operate in equity as an agreement for a lease,³ and even at law it may operate as a contract with respect to any stipulations contained therein,⁴ as, except in Maine and Massachusetts (where a ten-

derstood not only those which must necessarily be seen, but those which may be seen or known on a careful inspection by a person ordinarily conversant with the subject. We think that it was the defendant's own fault that he did not ascertain what easements the owner of the adjoining house exercised at the time of his purchase; and therefore we think the rule must be discharged." The doctrine announced in this case, is a marked innovation upon the law of easements by implied grant. Yet its apparent equity commends it, and it has been favorably commented upon in numerous cases both in this country and England. *Curtis v. Ayrault*, 47 N. Y. 78; *Huttemier v. Albro*, 18 id. 52; *McCarty v. Kitchenman*, 47 Penn. St. 248; *Dodd v. Burchell*, 1 H. & C. 121; *Glove v. Harding*, 8 H. & N. 944; *Crossly v. Lighttower*, L. R., 2 Ch. Ap. 478; *Polden v. Bastard*, 4 B. & S. 258; *Ewart v. Cochrane*, 1 H. & C. 681; *Worthington v. Gimson*, 2 E. & E. 618; *Butterworth v. Crawford*, 46 N. Y. 349; *Seymour v. Lewis*, 13 N. J. Eq. 439; *Dunklee v. Wilton*, R. R., 24 N. H. 489; *Hall v. Lund*, 1 H. & C. 676, *Questioned in Philbrick v. Ewing*, 97 Mass. 133; *Carbray v. Willis*, 7 Allen (Mass.) 369; *Randall v. McLaughlin*, 10 id. 366; *Warren v. Blake*, 54 Me. 276; and condition-

ally in *Butterworth v. Crawford*, ante; and in *Scott v. Bental*, 23 Grat. (Va.) 1. But it should be borne in mind that the largest latitude given, as announced in this case, includes only those easements "which may be seen or known upon a careful inspection by a person ordinarily conversant with the subject." Indeed, the court say, in justification of the judgment, that "it is clear that he *must* have known, or *ought* to have known that some drainage then existed, and if he had inquired he would have known of this drain." Thus it will be seen that the doctrine is only intended to apply to such *necessary* easements *as*, although not apparent, *would naturally be the subject of inquiry*.

¹ *Pyer v. Carter*, 1 H. & N. 916. See also as to a way, *Grant v. Chase*, 17 Mass. 443. Unless it is an old easement, in which case it seems it would pass under the words "appertaining and belonging," *CROMPTON, J.*, in *Bastard v. Polden*, 4 B. & S. 264.

² *Parker v. Taswell*, 2 DeG. & J. 559; *Cowen v. Phillips*, 38 Beav. 18.

³ *Hayne v. Cummings*, 16 C. B. N. S. 421; *Bond v. Rosling*, 1 B. & S. 871; *Tidey v. Mallett*, 16 C. B. N. S. 298; *Rollason v. Leon*, 7 H. & N. 73.

ancy from year to year, except when expressly created in writing, is unknown) if the tenant enters into possession and pays rent under a void lease, he becomes a tenant from year to year, subject to all the terms of the lease applicable to such a tenancy,¹ and determinable only by six months' notice to quit, at the end of any year of the time, except where otherwise provided by statute;² but, upon the expiration of the term named in the lease the term expires by its own limitation, and without any previous notice to quit.³ But, unless the tenant enters into possession under the lease, he will not be liable for the rent of the premises, nor for not taking possession,⁴ nor will the lessor be liable for not giving possession.⁵

SEC. 211. *Leases not affected by statute of frauds.*—In all the States except Maine and Massachusetts, a parol lease for one year is good, and in many of the States for three years, and in some for seven, but leases for a longer term are generally required to be by deed, executed according to the direction of the statute.

SEC. 212. *Leases by deed—What are.*—A deed is a writing sealed and delivered by the parties thereto, and is either an indenture or a deed poll. An indenture is an instrument, or rather a series of instruments under seal, of which each party holds a copy, executed the same as the original, and which is cut or indented on the top or side to correspond with the other,⁶ and unless the paper

¹ Cooch v. Goodman, 2 Q. B. 580; Riggs v. Bell, 5 T. R. 472; People v. Rickert, 8 Cow. (N. Y.) 226; Taggard v. Roosevelt, 2 E. D. S. (N. Y. C. P.) 100; Strong v. Crosby, 21 Conn. 398; Schuyler v. Leggett, 2 Cow. (N. Y.) 660; Thomas v. Wright, 9 S. & R. (Penn.) 87; Richardson v. Gifford, 1 Ad. & El. 52; Warner v. Browne, 8 East, 165; Thompson v. Amey, 12 Ad. & El. 479; Pistor v. Cator, 9 M. & W. 815; Berry v. Lindley, 3 M. & Gr. 498; Tress v. Savage, 4 E. & B. 36; Lee v. Smith, 9 Exchq. 662; Pennington v. Tanriere, 12 Q. B. 998; Loughran v. Smith, 11 Hun (N. Y. S. C.) 311.

² Hager v. Dibble, 8 Rich. (S.

C.) 222; Lesley v. Raulolph, 4 Rawle (Penn.), 128.

³ Tress v. Savage, ante; Cole on Ejectment, 221, 444.

⁴ Edge v. Strafford, 1 C. & J. 391; Inman v. Stamp, 1 Stark. 12.

⁵ Drury v. Macnamara, 5 E. & B. 612; Jinks v. Edwards, 11 Exchq. 775.

⁶ 1 Inst. 171; 2 Blackstone's Com. 295; Styles, 459. An indenture is preferable to a deed poll because it possesses many advantages over the latter, as it may operate by estoppel, and contain covenants on the lessee's part which cannot be attained by a deed poll, which is, strictly speaking, a unilateral deed. Indeed it

or parchment is cut or indented as previously stated, except where the statute has done away with this formality, the fact that it begins "This Indenture," &c., does not make it an indenture, because no words of the parties can dispense with this formality; for, although there may be an indenture where there are no words declaring it so, yet without indenting, no words can make it an indenture.¹ The peculiarity of an indenture is, that all the parts make but one deed, and each part has the same effect and force as all the parts together, as they are regarded as the mutual acts of the parties thereto, each of whom is bound by either part of the same, for the words of the indenture are the words of each party.² In legal effect, each part is an original, but in practice, the part executed by the grantor is the original, and the rest duplicates or counterparts,³ and these counterparts cannot be disputed or impeached by the lessee, and are primary evidence against him and his grantees or assignees of the execution and contents of the lease.⁴ Every lease is presumed to be by deed until the contrary is shown, and whenever a deed is referred to in the pleadings it is presumed to be a deed poll, unless it is alleged to be indented.⁵ Leases required to be by deed must be written or printed upon parchment or paper, and they cannot be exemplified upon cloth, leather, wood or the like, for the

was formerly called *Charta de una parte*. *Locke v. Wright*, 1 Stra. 571; *Pordage v. Cole*, 1 Saund. 819. It (a deed poll) may be said to be a declaration by the party executing it of an act done, or intended to be performed by him for a third person. The lessee's acceptance of an interest under the deed—which is implied until he expressly dissents—*Thompson v. Leach*, 2 Vent. 198; *Gorton v. —*, 2 Roll's Abr. 787, may render him liable to a distress or an action of debt, for non-payment of rent; but not to an action of covenant, *Cross v. Powell*, Cro. Eliz. 483; *Chancellor v. Poole*, 2 Doug. 784; *Wilkins v. Fry*, 1 Mer. 286, as a covenant cannot generally be created except by deed executed

by the covenantor. By the custom of London, *Fitzherbert's Natura Brevium*, 146; *Comyn's Dig. Tit. London (N.) 1 of Bristol*; *Wade v. Benham*, 1 Leon 2, and in the case of a lessee of the government, by patent, it is held that the acceptance of a lease by a deed binds the lessee to the covenants therein. *Ewre v. Strickland*, Cro. Jac. 240. See also *Brown v. McFarren*, 5 Ir. Rep. 212.

¹ Co. Litt. 229.

² Litt. Sec. 870; *Plowden*, 184, 421.

³ 2 Blackstone's Com. 296.

⁴ *Paul v. Meek*, 2 Y. & J. 116; *Hughes v. Clark*, 10 C. B. 905; *Burleigh v. Stibbs*, 5 T. R. 465; *Homes v. Pearce*, 1 F. & F. 283; *West v. Davis*, 7 East, 363.

⁵ *Spark v. Spark*, Cro. Eliz. 658

reason that parchment and paper are regarded as most durable, and the writing or printing upon them is less liable to be vitiated, altered or corrupted, or become illegible, than upon other substances. It may be in any character or language which is susceptible of translation or accurate interpretation.¹ The estate or interest in the land is derived from the lessor, and the lease is only evidence of the legal conveyance of the estate or interest. Therefore, if, after the lease has been executed and delivered, it is lost or cancelled, if the lessee can prove the existence of the term he does not lose his estate in the land.² If the lease is required to be, and has been, recorded, provision is generally made by statute that it may be proved

¹ 2 Blackstone's Com. 297.

² Ward v. Lumley, 5 H. & N. 87; Reed v. Brookman, 3 T. R. 151. The cancellation of a lease does not operate as the surrender of it. It destroys the deed and avoids the covenants, but it does not divest the estate. Actions founded on the privity of contract are gone, but actions founded on the *privity of estate* remain so long as the term lasts; and so long as a reversion remains in the lessor, the rent continues as an incident thereof. At the common law, an assignee of the reversion may sue the lessee in debt upon the demise, *because of his privity of estate*, but he cannot sue upon the covenants, *because there is no privity of contract*. See Strong v. Crosby, 21 Conn. 398. It may be said that, *where an estate has actually passed under a deed, the cancellation or destruction thereof does not divest the estate, although the parties, by parol, have agreed to that effect*. In Bolton v. Carlisle, 2 H. Bl. 260, EYRE, C. J., said, "I hold clearly that the cancelling of a deed will not divest property which has once passed by transmission of possession; and I would go further and say that the law is the same as to things which lie in grant." Berkley v. York, 6 East, 86; Lewis v. Bingham, 4 B. & Ald. 672; Perrott v. Perrot, 14 East, 428. Where the action is predicated upon the privity of estate, it is entirely independent of the contract which the parties entered into by the lease, Falmouth

v. Roberts, 9 M. & W. 469, and notwithstanding the cancelling of the lease, it may be given in evidence to show that, and what estate passed. Ins. Co. v. Fitzgerald, 16 Q. B. 432. *Nil debet* wherever the old system of pleading exists is a good plea to an action for rent reserved upon a lease by deed, Wilson v. —, Hard. 332, and the reason is, that the demise is the foundation of the action, and the deed is only evidence of the demise. Warren v. Causett, 8 Mod. 107. In Atty.-Genl. v. Parrish, 1 B. & P. 104, SIR J. MANSFIELD, C. J., said that the case of debt for rent is an exception to the general rule that, if a contract be entered into by deed, the deed must be declared upon; and he said, "that exception, however, seems to have proceeded on the ground that, by the devise, an interest has passed in the land." See also 1 Wm. Saund. 276 n.; Southwel v. Brown, Cro. Eliz. 571, where it is stated that the distinction is that where a lease for years *by indenture* is the gist and foundation of the action, as where debt or covenant is brought therein, it is necessary to state that the demise was by deed, and to set out so much thereof as is necessary to support the action and no more. Elliott v. Blake, 1 Lev. 88; Dundas v. Weymouth, Comp. 665. But where the lease is only inducement to the action, it is only necessary to state generally that the lessor demised the premises for a certain term, without

by a copy from the records, duly certified by the proper recording officer. If the other party has a counterpart of the lease, the plaintiff, in an action predicated thereon, may compel its production, or, in default of its production, may prove its contents by parol.

SEC. 213. *Seal*.—At the common law all freehold estates were required to be conveyed either by deed or by livery of seizin without writing, but by the Statute of Frauds in England, and in most of the States of this country, the only mode of conveyance of a freehold is by deed. In Vermont, Massachusetts, and South Carolina, all conveyances of freeholds are required to be by deed. Even though conveyances by statute are not required to be under seal, yet, the common law rule is adopted, and a seal is made necessary to give to the instrument the character of a deed.¹ At the common law, a seal is an impression upon wax or wafer or other substance that will bear and hold an impression.² But in the New England States, and in New York, New Jersey and North

saying that it was by indenture, but *quod cum diminuset* is generally sufficient. In 1 Wm. Saund. 241 n., it is said, "An assignee of a reversion may also have an action of debt for rent against the lessee, and the action being founded, not upon any privity of contract, but upon priority of estate, is local. The action of debt lays for the assignee of the reversion at the common law, for the rent being incident to the reversion, and the lessee being in possession of the lands, and in perception of the profits, the law creates such a privity between them as will support an action for rent. 1 Roll. Abr. (B) pl. 2; Walker's Case, 3 Coke, 22; Glover v. Cope, 4 Mod. 81; Barker v. Damer, 3 Mod. 337. These cases illustrate the rule that an action for rent is not founded on the deed, but on the demise; and that, though a deed be cancelled by the consent or agreement of the parties will annul all actions in which it is necessary to declare on the deed itself, yet it does not divest the estate of the lessee or

destroy the lessor's right of action for the rent which is founded on the privity of estate, and act upon privity of contract.

¹ 3 Inst. 169; 2 Blackstone's Com. 297.

² 3 Inst. 169; Warren v. Lynch, 5 John (N. Y.) 239; Beardsley v. Knight, 4 Vt. 471; Ross v. Bedell, 5 Duer (N. Y. Supr. Ct.), 462; Hughes v. Debnam, 8 Jones (N. C.), L. 127; Pease v. Lawson, 33 Mo. 35; Tasker v. Bartlett, 5 Cush. (Mass.) 359. And a seal by stamping on the paper is not sufficient except it is so provided by statute, Bank of Rochester v. Gray, 2 Hill (N. Y.), 227; Farmers' Bank v. Haight, 3 id. 498; and a scroll of ink or other device is not sufficient. Warren v. Lynch, ante; Perrine v. Cheeseman, 11 N. J. 174. But see Force v. Craig, 7 id. 272, where a flourish or scroll against the signature of a signer to a note was held sufficient to enable the jury to find that he intended to execute a sealed instrument, and that it was sealed and delivered.

Carolina, the practice is to attach to the deed or instrument another piece of paper without any impression whatever and it is usually attached to the instrument with 'mucilage,' instead of with wax or a wafer, and an instrument not sealed is not a deed.' In most if not all, the other States, a mere scroll or flourish of the pen at the end of the signature is held to be a seal, if the parties intended it as such.' Mere words cannot dispense with a seal, as "witness my hand and seal," when no seal or scroll is appended to the signature; and in Virginia, Indiana, Louisiana, Missouri, Iowa, Delaware and Alabama, it is held that a writing with a scroll

¹ Gillespie v. Brooks, 2 Redf. (N. Y. Surrogate) 849; Turner v. Field, 44 Mo. 883.

² And this is the rule even in those States where a scroll is treated as a seal. Therefore, unless an instrument is sealed according to the method adapted in the State where executed, or where the land lies, it is not a deed. Jones v. Crawford, 1 McMull. (S. C.) 873; Taylor v. Morton, 5 Dana (Ky.) 365; Davis v. Brandon, 3 Miss. 154; Arms v. Burt, 1 Vt. 306; Killman v. Brown, 4 Mass. 448, and passes no title. Shortridge v. Catlett, 1 A. K. Mar. (Ky.) 587; Hurley v. Ramsey, 49 Mo. 309; Pratt v. Clemens, 4 W. Va. 448. But if an instrument has once been sealed, it is not avoided by a removal of the seals by the obligor or by their accidental removal. Colts v. United States, 1 Gall. (U. S.) 69. An agent who executes an instrument under seal must be authorized under seal. Worrall v. Munn, 5 N. Y. 229. In Mississippi, however, it is held in equity that a deed executed and signed by a person as agent is good as a deed, even though the deed is not sealed by him. McCaleb v. Pralat, 25 Miss. 357. Where an instrument is required to be recorded, and the law provides that none but sealed instruments shall be recorded, the fact that the record fails to show that a seal was attached to the instrument, will not overcome the presumption that the law raises, that the instrument was sealed, or the recording officer would not have recorded it. Stark-

weather v. Martin, 28 Mich. 471.

³ Ralph v. Gist, 4 McCord (S. C.) 267; Jones v. Logwood, 1 Wash. (Va.) 42; Stahter v. Cowman, 7 G. & J. (Md.) 234; Bohannon v. Hough, 1 Miss. 461; Long v. Ramsay, 1 S. & R. (Penn.) 72; Fleming v. Powell, 3 Tex. 225; Smith v. Baker, Ga. Dec. Part. I., 126; Scruggs v. Brackin, 4 Yerg. (Tenn.) 528; Lindsay v. State, 15 Ala. 43; Bertrand v. Burd, 4 Ark. 195; Hastings v. Vaughn, 5 Cal. 315; Comerford v. Cobb, 2 Fla. 418; Bradfield v. McCormick, 3 Blackf. (Ind.) 161. The word *seal* written against the signature of a party to an instrument is treated as a seal in Mississippi. Hudson v. Poindexter, 42 Miss. 304; Whittington v. Clarke, 16 Miss. 480; and it would seem that it should be so regarded in all these States where a scroll is treated as a seal, because the word clearly imports the intention of the party to execute a sealed instrument. Whitley v. Davis, 1 Swan (Tenn.) 333. But in Virginia and Indiana this has been held insufficient, and an instrument concluding "witness our hands" with a scroll annexed, and the word "seal" written therein, was held to be only a simple contract. Jenkins v. Hart, 2 Rand. (Va.) 446; Deming v. Billit, 1 Blackf. (Ind.) 241. See also post p. 328 for instances where a similar rule is held in other States.

⁴ Vance v. Funk, 3 Ill. 263; Williams v. Young, 3 Ala. 145; Moore v. Leseur, 18 id. 606.

annexed and the word "seal" written therein, but having no expression *in the body of the instrument* denoting that it is sealed, *is not a sealed instrument.*¹ But in Tennessee and Mississippi a contrary doctrine is held, and a scroll is treated as a seal whenever, from the body of the instrument or the word "seal" written in the scroll, it appears that the parties intended to execute a sealed instrument;² and in Missouri the word "seal" written at the end of the name of the party, *and referred to and adopted in the testimonium clause*, is held to be a sufficient sealing;³ and in Pennsylvania an instrument with the attesting clause "witness my hand," signed by the party sought to be charged, with a seal annexed to his name, is held to be evidence from which a jury may presume a sealing and delivery;⁴ and in all cases where a *seal*, within the common law rule, is annexed to the name of a party to an instrument, although the word "seal" is not used in the instrument, the instrument is a specialty.⁵ A slit in a parchment with a ribbon through it is not a seal,⁶ nor is a mere impression or stamping upon the paper upon which the instrument is written,⁷ except in the case of corporations where the statute so provides, or a different rule has been established by custom.⁸ Whether a seal *printed*, but not *impressed* upon the paper upon which the instrument is written, is sufficient in the case of a corporation is not clear. It has been held sufficient in Maine,⁹ and *not* sufficient in Massachusetts.¹⁰ In the case of a corporation when the com-

¹ Moore v. Leseur, 18 Ala. 606; Bell v. Keefe, 18 La. An. 524; Boynton v. Reynolds, 8 Mo. 79; Long v. Long, 1 Morr. (Iowa) 43; Walker v. Keile, 8 Mo. 801; Armstrong v. Pearce, 5 Harr. (Del.) 351; Jenkins v. Hunt, 2 Rand. (Va.) 446; Deming v. Billit, 1 Blackf. (Ind.) 241.

² Hudson v. Poindexter, 42 Miss. 304; Whitney v. Davis, 1 Swan Tenn. 333.

³ Gorner v. Smith, 49 Mo. 318.

⁴ Miller v. Blinder, 28 Penn. St. 499.

⁵ An instrument having a seal affixed thereto is a deed, though

the affixing of the seal is not mentioned in it. Taylor v. Glazer, 2 S. & R. (Penn.) 502; Wing v. Chase, 35 Me. 260; Ashman v. Ayers, 4 Gratt. (Va.) 233.

⁶ Duncan v. Duncan, 1 Watts. (Penn.) 323.

⁷ Bank of Rochester v. Gray, 2 Hill (N. Y.) 227.

⁸ Hender v. Pinkerton, 14 Allen (Mass.) 381; Curtis v. Leavitt, 15 N. Y. 89.

⁹ Woodman v. York, &c., R. R. Co. 50 Me. 549.

¹⁰ Bates v. B. & N. Y. R. R. Co., 10 Allen (Mass.) 251.

mon seal appears upon an instrument it is presumed to have been placed there by authority,' and in Ohio a conveyance by a corporation under *the corporate seal* is valid *without signature*, and the seal is presumed to have been affixed with authority.' Several persons may bind themselves by *one* seal if there is nothing to indicate that such was not their intention.' *Prima facie*, where several names are signed to an instrument, and a seal is affixed to but one, it will be presumed to be the seal of the party to whose name it is affixed, but this presumption may be overcome by proof that it is attached by the authority of the others, in which case it will be the seal of all.' Where a lease is under seal, a change in its terms, cannot be made by parol' even though made upon a sufficient consideration. But the terms may be changed by an endorsement on the lease.'

An endorsement upon a sealed instrument *made at the time of its execution* becomes a part thereof,' and does not change the character of the instrument; but an endorsement not under seal, subsequently made, referring to the lease for an explanation of its terms and varying any of the terms of the instrument, *reduces it to a parol contract*, so that assumpsit and not covenant becomes the proper remedy for the recovery of rent under, or for the breach of any of its conditions.'

SEC. 214. **Signing.**—A lease or deed may be signed for the grantor by a third person in his presence and by his

¹ Musser v. Johnston, 42 Mo. 74; Sheehan v. Davis, 17 Ohio St. 571.

² Sheehan v. Davis, 17 Ohio St. 571.

³ Yale v. Flanders, 4 Wis. 96; Mackay v. Bloodgood, 9 John. (N. Y.) 285; Larsden v. Sharp, 9 Humph. (Tenn.) 224; Carter v. Chardron, 21 Ala. 72; Bank v. Bugbee, 19 Me. 27; Williams v. Greer, 12 Ga. 459; Bank v. Bailey, 4 Ark. 458; Bowman v. Robb, 6 Penn. St. 302; Flood v. Yandee, 1 Blackf. (Ind.) 102; Banhannon v. Lewis, 3 T. B. Mon. (Ky.) 376.

⁴ Lunsford v. LaMotte Lead Co., 54 Mo. 426; Van Alstyne v. Van Slyck, 10 Barb. (N. Y.) 888; Davis

v. Burton, 4 Ill. 41; Youngborough v. Monday, 2 Dev. (N. C.) L. 3.

⁵ Smith v. Nurr, 33 Hun (N. Y.) 567.

⁶ Gaffney v. Greenbaum, 64 Iowa 492.

⁷ Linsley v. Tibbals, 40 Conn. 522; Hetts v. Miller, 3 Paige Ch. (N. Y.) 254; Emmerson v. Murray, 4 N. H. 171; Flint v. Brandon, 4 B. & P. 73; Lyman v. Warrington, 1 Starkie, 162.

⁸ Hydeville Co. v. Eagle R. R. & Slate Co., 44 Vt. 395. But see Williams v. Handley, 3 Bibb. (Ky.) 10; Russell v. Scott, 4 Cow. (N. Y.) 279; Goodright v. Mark, 4 M.

direction,' and this is frequently done when the lessor or grantor is an illiterate person, and unable to write his name, but in such cases the instrument must be sealed and delivered by the grantor,' and, although in the case last cited it was held that the instrument need not be read over to him unless he required it, yet it is more prudent to do so, and in some of the States, at least, it is held to be indispensable, when the grantor cannot read.

A lease or other conveyance may be executed by the grantor making his mark, the practice being in such cases for some third person to write his name and for the grantor to make a cross either between the names or at either end thereof; but any mark made by him *which is intended as a signature by him*, is sufficient,' but the signature so made should be witnessed even though the execution of such instruments is not required to be witnessed by statute. A lease may be signed by a third person for the lessor as follows: John Doe by Richard Roe, and if done in his presence, and by his direction, and attested by a witness, it is valid to pass the estate.* A deed or lease executed by an agent or attorney in this form, "John Doe for Richard Roe," is sufficient, if John Doe was duly authorized to execute such instruments for Richard Roe.* But, when a conveyance is executed by a third person, it must be shown affirmatively that he had authority to do so, and in some of the States his authority must not only be in writing under seal,' but must also be recorded with

& S. 80, where such an indorsement was held inoperative to convey any interest.

¹ Jansen v. McCahill, 22 Cal. 563.

² Rex v. Longnor, 1 N. & M. 577.

³ Suffern v. Butter, 18 N. J. Eq. 220.

⁴ — v. —, 3 Atk. 869.

⁵ Gardner v. Gardner, 5 Cush. (Mass.) 488. But where a deed purports to be or is made by an agent or attorney it must be made in the name of the principal. Love v. Sierra Nevada, &c., Co., 82 Cal. 699. But, if it is signed by the agent or attorney in his own name only, yet, if enough appears upon the face of the instrument to show that he was acting as attorney and

not as principal, it is a good execution, Tenant v. Blacker, 27 Ga. 418; Videau v. Griffin, 21 Cal. 389; and when there has been such a lapse of time as will bar a writ of right, it will be presumed that the attorney was authorized to make the conveyance. Goodwin v. McClure, 3 Gratt. (Va.) 291.

⁶ Mussey v. Scott, 7 Cush. (Mass.) 315.

⁷ In Vermont, by statute, the instrument must be recorded, and in New Jersey and Tennessee the authority must be conferred by deed. Tappan v. Redfield, 5 N. J. Eq. 339; Smith v. Dickerson, 6 Humph. (Tenn.) 261.

the instrument.¹ The fact that the name of the grantor is mis-spelt does not invalidate the deed,² and, even though he signs by a different name than that recited in the instrument his identity may be proved, and the deed thereupon is operative,³ and where he signs by a wrong name, yet, if he is designated by his true name in the lease, it will be good ;⁴ but a deed executed without the name of a grantee is void.⁵ A lease or deed by a corporation should be in its corporate name and under its corporate seal,⁶ although it has been held in Ohio, that a conveyance by a corporation under its corporate seal is good, although not signed,⁷ and in England it is doubted whether, under the Statute of Frauds, leases by deed are required to be signed.⁸ When a lease or deed is executed by a third person without authority, it may be validated by a subsequent oral ratification.⁹ But, unless ratified by the principal, a lease executed without authority, or in the name of the agent alone, is void, and inoperative to convey any estate or interest in the premises demised.¹⁰ Indeed, an instrument purporting to convey a term, by one not having apparent authority to make it, is not, and cannot be a lease,¹¹ unless the principal afterwards delivers it, in which case he thereby adopts the sealing and makes it his own deed.¹² A lessee entering and hold-

¹ Videau v. Griffin, 21 Cal. 389 ; Waggener v. Waggener, 8 T. B. Mon. (Ky.) 542.

² O'Meara v. No. American, & Co., 2 Nev. 112.

³ Tustin v. Faut, 23 Cal. 237. The rule is, in accordance with the maxim *nihil facit error nominis cum de corpore constat* that mistakes in the description of the parties, unless *very* gross, will not vitiate the deed. If the description, *however imperfect*, clearly distinguishes the person described from all others, it is sufficient, *Shep. Touch. 233* ; unless, however, the lessor signs the instrument, it will not amount to a lease, *Marlow v. Wiggins*, 4 Q. B. 367 ; and if there be two or more granting parties, *all* should sign, and if only one or two or more joint tenants or tenants in common sign, *no more than the interest of the one signing will pass*, *Jackson v. Stan-*

ford, 19 Ga. 14 ; *Co. Litt. 192 a*, and if, in an action upon the lease, it is alleged that *all* demised, and upon its production it appears that it was executed only by one, the variance is fatal. *Wilson v. Woolfryes*, 6 M. & S. 341.

⁴ Middleton v. Findla, 25 Cal. 76.

⁵ Chase v. Palmer, 29 Ill. 306.

⁶ Hitch v. Barr, 1 Ohio, 890.

⁷ Sheehan v. Davis, 17 Ohio St. 571.

⁸ Cooch v. Goodman, 2 Q. B. 530 ; Aveline v. Whisson, 4 M. & Gr. 801.

⁹ McIntyre v. Park, 11 Gray (Mass.) 102 ; *Gunter v. Williams*, 40 Ala. 561.

¹⁰ Post v. Martius, 17 Barb. (N. Y.) 149 ; *Commercial Bank v. Warren*, 15 N. Y. 577 ; *Dean v. Raesler*, 1 Hilt. (N. Y. C. P.) 420.

¹¹ Hayard v. Haswell, 6 Ad. & El. 265.

¹² Tupper v. Foulkes, 9 C. B. N. S. 797.

ing under a lease not executed by his landlord, is not estopped, in an action by the assignee of the lessor, from showing such non-execution;¹ and under such circumstances, although the lease is executed by the lessee, if it is not executed by the lessor the lessee is not liable upon the covenants therein, for, the lease being void, there is no consideration for his covenants,² even though he occupies during the entire term.³ But, although not liable in covenant, upon the covenants, he is liable upon an implied tenancy subject to the like terms and conditions contained in the lease, so far as they are applicable to a tenancy from year to year.⁴

SEC. 215. *Attestation.*—In all the States except New York, Massachusetts, Pennsylvania, Kentucky and Arkansas, one or more subscribing witnesses are necessary to the valid execution of a deed, but in those States where the deed is properly acknowledged no attesting witnesses are necessary, but, where it is not acknowledged before delivery, at least one attesting witness is necessary in New York.⁵ In South Carolina, New

¹ *Rose v. Poulton*, 2 B. & Ad. 822; *Cardwell v. Lucas*, 2 M. & W. 111; *Soprani v. Skurro*, Yelv. 19.

² *Swatman v. Ambler*, 8 Exchq. 72; *Pitman v. Woodbury*, 8 Exchq. 4; *Knipe v. Palmer*, 2 Wils. 182; *Waller v. Dean, &c.*, Ow. 186. In *Soprani v. Skurro*, Yelv. 18, it is held that if one party executes his part of the deed it shall be his deed, though not executed by the other. See *Comyn's Dig. (Fact (C.))* 2, or *Cooch v. Goodman*, 2 Q. B. 580, *contra*, and holding that covenant will lie.

³ *Pitman v. Woodbury*, ante *Swatman v. Ambler*, ante.

⁴ *Loughran v. Smith*, 11 Hun. (N. Y. S. C.) 818. In this case GILBERT, J., says: "It is laid down in *Soprani v. Skurro*, Yelv. 18, that a lease executed by the lessee and not by the lessor is inoperative both as regards the interests and the covenants, because the covenants depend upon the lease, and if there be no lease there can be no covenants. But this proposition was over-ruled in *Cooch v. Good-*

man, 2 Q. B. 580, in which the court were clearly of opinion that if a lease be executed by the lessee, and he enters and enjoys the land demised, he is liable to an action of covenant by the lessor, though he, the lessor, did not execute the deed. They consider the case as falling within the general rule laid down in *Comyn's Digest, Fact (C.)*, 2, that if one party executes his part of the indenture, it shall be his deed though the other does not execute his part." But the doctrine of *Cooch v. Goodman*, ante, is not accepted as good law, and Mr. WOODFALL, in his *Landlord and Tenant*, 140, lays down a contrary rule, and a contrary doctrine is held in *Pitman v. Woodbury*, 8 Exchq. 4, and in *Swatman v. Ambler*, 8 Exchq. 72. Especially is it obnoxious to criticism, when the agreement is for a term within the Statute of Frauds, and, consequently, not binding upon the lessor. *Loughran v. Smith*, ante.

⁵ *Genter v. Morrison*, 81 Barb. (N. Y.) 155.

Hampshire, Georgia, Mississippi, Vermont, Maryland, Rhode Island, Tennessee, Ohio, Delaware, Illinois, Indiana and Connecticut, two attesting witnesses are necessary where the deed is to be proved by witnesses, and in all the others, one. The subscribing witnesses are necessary to enable the other party thereto to inquire into the circumstances of the sealing and delivery,¹ consequently they should be persons who are competent to testify to the facts, and who labor under no disability that disqualifies them from testifying to the facts, in an action between the parties thereto, or generally. Thus, neither the wife of the grantor or grantee are competent, nor can one grantor or grantee be a witness to the signature of a co-grantor,² nor, in those States where interest disqualifies, can an interested party be a witness,³ but if the witness *had no* interest at the time when the deed was executed, the fact that he had subsequently acquired one does not invalidate the deed.⁴ No witnesses are required to a parol lease.

SEC. 216. *Delivery.*—Delivery is essential to the validity of a deed, and proof of execution, without delivery, is of no avail,⁵ but it may be actual or verbal. If it is shown that there was an *intention or assent of the mind of the grantor* to treat the instrument as a deed, it is sufficient to clothe it with the attributes of a valid legal instrument.⁶ But it is necessary that the grantor should put himself in such a position in reference to the instrument that he cannot recall it, and that all the legal formalities should have been complied with,⁷ or it will not be opera-

¹ Morkley v. Swartzlander, 8 W. & S. (Penn.) 172.

² Townsend v. Downer, 27 Vt. 119; Corbett v. Norcross, 35 N. H. 99.

³ Winsted, &c., Bank v. Spenser, 26 Conn. 195.

⁴ Carley v. Carter, 23 Ala. 612.

⁵ Armstrong v. Stovall, 26 Miss. 275; Oliver v. Stone, 24 Ga. 63; Stiles v. Brown, 16 Vt. 563; Hatch v. Hatch, 9 Mass. 307; Porter v. Buckingham, 2 Harr. (Del.) 197; Herbert v. Herbert, 1 Ill. 278; Clarke v. Ray, 1 H. & J. (Md.) 818; Jackson v. Sheldon, 23 Me. 569.

⁶ Thompson v. Hammond, 1 Edw. (N. Y.) Ch. 497; Farrar v. Bridge, 5 Humph. (Tenn.) 44; Crawford v. Berthalf, 1 N. J. Eq. 458; Byers v. McClanahan, 6 G. & J. (Md.) 250; Fisher v. Hall, 41 N. Y. 46.

⁷ Brevard v. Nielely, 4 Sneed. (Tenn.) 324. It must be understood by the parties that the instrument is completed and ready for delivery, in order to have a placing of it in the hands of the grantee constitute a delivery. If it is merely left with him for ex-

tive.¹ The grantor must do some act putting it beyond his power to revoke it. There can be no delivery so long as it is in his custody or subject to his control ;² until he has parted with the instrument, *or the right of control over it*, he may recall or destroy it.³ It is not necessary to prove a formal delivery : it may be inferred from the *acts* of the party without words, or from words alone, or from both combined.⁴ The question of delivery is one of intention,⁵ therefore, although possession thereof by the grantee, or the fact that it has been recorded, is *prima facie* evidence of a delivery ;⁶ yet, this presumption may be overcome by proof that there was no intent to convey, and that the lease was to be returned to the grantor again ;⁷ but the grantor or those claiming under him take the burden of proving non-delivery,⁸ which he must show affirmatively and beyond a reasonable doubt, and if the matter is left in doubt upon the *whole* proof,

amination, or if anything more remains to be done to perfect it, it is not a delivery. *Stiles v. Probat*, 69 Ill. 382 ; *Graves v. Dudley*, 20 N. Y. 76.

¹ *Reid v. Butt*, 25 Ga. 28.

² *Duer v. James*, 42 Md. 492 ; *Jackson v. Dunlap*, 1 John. (N. Y.) Cas. 114 ; *Fisher v. Hall*, 41 N. Y. 416.

³ *Reid v. Butt*, 25 Ga. 28 ; *Cook v. Brown*, 84 N. H. 460 ; *Johnson v. Farey*, 45 id. 505.

⁴ *Duer v. James*, 42 Md. 492. In *Farrar v. Bridges*, ante, the court say : " A formal delivery of a deed is not necessary to give it effect ; and, though left in the possession of the grantor, it will pass the property embraced by it, *if it appears that it was executed with that intent*. But in such a case, it is apprehended that the grantee must be shown to have had possession of the instrument, fully executed, and with the assent of the grantor, and that it was left with the grantor by him for safe keeping or other purpose, so that the power of recalling it by the grantor is lost. *Hammell v. Hammell*, 19 Ohio 17 ; *Clark v. Gifford*, 10 Wend. (N. Y.) 810 ; *Sauverbye v. Arden*, 1 John. (N. Y.) Ch. 240 ; *Austin v. Feridall*, 2 McArthur (U.

S. C. C.) 362, or that a fixed intention should be shown on the part of the grantor, that the title under the conveyance should vest in the grantor. *Newton v. Bealer*, 41 Iowa 834 ; *Ward v. Ward*, 2 Hayw. (N. C.) 226. *But if the grantor holds the deed until some condition is performed by the grantee*, there is no delivery, and the deed is inoperative ; and especially is this so if the grantor subsequently deals with the land in a manner inconsistent with the idea that he intended the deed to be operative. *Jackson v. Dunlap*, 1 John. (N. Y.) Cas. 114.

⁵ *Steele v. Miller*, 40 Iowa 402 ; *Harris v. Sanders*, 2 Strobb. (S. C.) Eq. 870 ; *McClure v. Calclough*, 17 Ala. 89 ; *Dayton v. Newman*, 19 Penn. St. 194 ; *Rivard v. Walker*, 89 Ill. 418 ; *Lloyd v. Taylor*, Ired. (N. C.) L. 475 ; *Warren v. Sweet*, 81 N. H. 332 ; *Stevens v. Hatch*, 6 Minn. 64.

⁶ *Billings v. Stark*, 15 Fla. 297 ; *Kille v. Ege*, 79 Penn. St. 15 ; *Gould v. Day*, 94 U. S. 405 ; *Carnes v. Platt*, 41 N. Y. Superior Ct. 435.

⁷ *Steele v. Miller*, 41 Iowa 402 ; as that it was delivered to a stranger in escrow, and wrongfully delivered to the grantee. *Nicholls v. Nicholls*, 28 Vt. 228.

⁸ *Black v. Shreens*, 18 N. J. Eq. 455.

the doubt will be resolved in favor of delivery.' The delivery of a deed to a stranger for the grantee is a good delivery if the grantee subsequently assents thereto,' or if it be left with such third person at the grantee's request.' But, in order to make a delivery to a third person operative, it must either be shown that it was left with him at the grantee's request, or that he subsequently assented thereto.' The acceptance of the conveyance by the grantee is an indispensable requisite, and a deed executed and procured to be recorded by the grantor is inoperative as against third persons unless the grantee's assent is established.' But such assent is established by showing that he subsequently had possession of the conveyance; and, where the deed is beneficial to him, from that fact assent is presumed, although recorded without his knowledge.' Sending a deed by mail, or depositing it in the post-office,' or leaving it in the recorder's office by direction of the grantee, is a delivery.'

SEC. 217. *Escrow.*—A deed may be delivered *in escrow*. That is, delivered to a third person, to be held by him until some condition is performed, and, until such event occurs, the title remains in the grantor; but upon

¹ Carnes v. Platt, 41 N. Y. Supr. Ct. 435.

² Brown v. Austin, 35 Barb. (N. Y.) 841; Fisher v. Hall, 41 N. Y. 416.

³ Eckman v. Eckman, 55 Penn. St. 269; Hatch v. Bates, 54 Me. 186; Morrison v. Kelly, 22 Ill. 610; Peavey v. Tilton, 18 N. H. 151; Cincinnati, &c., R. R. Co. v. Iliff, 13 Ohio St. 235; Church v. Gilman, 15 Wend. (N. Y.) 656; Guest v. Buson, 2 Houst. (Del.) 246; Fewell v. Kessler, 30 Ind. 195.

⁴ Cones v. Platt, 38 How. Pr. (N. Y.) 100; Fewell v. Kessler, ante.

⁵ Maynard v. Maynard, 10 Mass. 456; Derry Bank v. Webster, 44 N. H. 264; Jones v. Bush, 4 Harr. (Del.) 1. It will be good against the grantor. Kerr v. Birnel, 25 Ark. 225.

⁶ Maynard v. Maynard, ante; Dawson v. Dawson, Rice (S. C.)

Eq. 248; Woodbury v. Fisher, 20 Ind. 887.

⁷ Tibbals v. Jacobs, 81 Conn. 428; Church v. Gilman, 15 Wend. (N. Y.) 656; Renfro v. Harrison, 10 Mo. 411; Mitchell v. Ryan, 3 Ohio St. 377.

⁸ McKinney v. Rhoades, 5 Watts (Penn.) 84.

⁹ Kemp v. Walker, 16 Ohio 118.

¹⁰ Johnson v. Branch, 11 Humph. (Tenn.) 521; Louhat v. Kipp, 9 Pla. 60; Millett v. Parker, 2 Met. (Ky.) 608; Hathaway v. Payne, 34 N. Y. 92; Granes v. Tucker, 18 Miss. 9; Dyson v. Bradshaw, 23 Cal. 528; Smith v. So. Royalton Bank, 32 Vt. 341; Carr v. Hoxie, 5 Mas. (U. S.) 60; Jackson v. Rowland, 6 Wend. (N. Y.) 696. And it makes no difference whether the parties call it an escrow or not. State Bank v. Evans, 15 N. J. L. 155.

performance of the condition the title vests in the grantee.¹ But, where a deed or other conveyance is left in escrow, if the depositary delivers it *before* the condition upon which delivery is predicated is performed, it is a nullity in the hands of the grantee.² The general rule is, that an instrument delivered as an escrow does not take effect so as to divest the title until the delivery to the grantee, but that the second delivery derives its validity from the first, of which it is the full execution and consummation. But if a strict equity requires it, the second delivery will be made to relate back to the first, so as to protect the grantee against intervening claims.³ A deed cannot be held as an escrow, either by the grantor or grantee. If it is intended to operate as such, it must be delivered to a third person, to be delivered to the grantee, when a certain condition is performed.⁴ But if it is delivered to the grantee to be delivered to a third person to be held until the grantee performs certain conditions, it operates as an escrow, whether he delivers it to such person or not.⁵

SEC. 218. *Recording. Acknowledgment.*—In all the States, leases for a term exceeding that which, under the statute, may be granted by parol, must be acknowledged or proved and recorded in the county, and in some of the States, in the town where the premises are situated, or it is inoperative, except as against the grantor, and those having notice of the lease, and subsequent *bona fide* purchasers of the premises, or persons taking mortgages upon, or leases of them, or creditors attaching them, will, as against the grantee or lessee, acquire a good estate.⁶ But actual notice by a subsequent purchaser or

¹ Peck v. Goodwin, Kirby (Conn.) 64; Beekman v. Frost, 18 John. (N. Y.) 544; Reyan v. Howe, 121 Mass. 424.

² Everts v. Agnes, 4 Wis. 343; Dyson v. Bradshaw, ante. Abbott v. Alsdorf, 19 Mich. 157.

³ Simpson v. McGlathery, 52 Miss. 728.

⁴ Hapgood v. Harley, 8 Rich. (S. C.) 825; Jordan v. Pollock, 14 Ga.

145; Braman v. Bingham, 26 N. Y. 488; Granes v. Tucker, 18 Miss. 9.

⁵ Brown v. Reynolds, 5 Sneed (Tenn.) 369.

⁶ Mallory v. Stodder, 6 Ala. 801; Wallis v. Rhea, 12 id. 646; Scott v. Doe, 1 Hempst. (Ark.) 275; Stafford v. Lick, 7 Cal. 479; Bissell v. Nooney, 38 Conn. 411; Herndon v. Kimball, 7 Ga. 422; Doe v. Reed,

attaching creditor is equivalent to registration,¹ and the

8 Ill. 815; *Orth v. Jennings*, 8 Blackf. (Ind.) 420; *Chiles v. Coaley*, 2 Dana (Ky.) 21; *Moore v. Jourdan*, 14 La. An. 414; *Curtis v. Deeviny*, 12 Me. 499; *Salmon v. Claggett*, 8 Bland Ch. (Md.) 125; *Somes v. Skinner*, 8 Pick. (Mass.) 52; *Bloomer v. Henderson*, 8 Mich. 895; *Wilder v. Brooks*, 10 Minn. 50; *Parmalee v. Simpson*, 5 Wall. (U. S.) 81; *Whittemore v. Bean*, 6 N. H. 47; *McCamont v. Patterson*, 89 Mo. 100; *Den v. Richman*, 13 N. J. L. 43; *Jackson v. Walsh*, 14 John. (N. Y.) 407; *Blake v. Graham*, 6 Ohio St. 580; *Thompson v. Bullock*, 1 Bay (S. C.) 364; *Harris v. Arnold*, 1 R. J. 126; *McCullough v. Endlay*, 8 Yerg. (Tenn.) 346; *Ayres v. Duprey*, 27 Tex. 598; *Morrison v. Shattuck*, 1 N. Chip. (Vt.) 42; *Hart v. Farmers' &c., Bank*, 33 (Vt.) 252; *Wilcox v. Colloway*, 1 Wash. (Va.) 88; *Casgray v. Core*, 2 W. Va. 353; *Ely v. Wilcox*, 20 Wis. 523. In some of the States a certain period is allowed, as thirty days in Alabama, *Wallis v. Rhea*, 12 Ala. 646; twelve months in Georgia, Delaware and Tennessee and Indiana, *Anderson v. Dugas*, 29 Ga. 440; *Cains v. Jones*, 5 Yerg. (Tenn.) 249; and eight months in Virginia, *Eppes v. Randolph*, 2 Call. (Va.) 125; six months in New Jersey, *Den v. Richman*, 13 N. J. L. 43, Pennsylvania, Maryland, *Ridgeley v. McLaughlin*, 3 H. & M. (Md.) 220, Illinois, Ohio, North Carolina and South Carolina, *Leger v. Doyle*, 11 Rich. (S. C.) 109; and three months in Mississippi and Missouri, and in the others, no time is limited, but instruments requiring to be recorded become operative according to the order in which they are "filed" in the recorder's office, or "recorded" according to the language of the statute.

¹ *Corliss v. Corliss*, 8 Vt. 473; *Smith v. Hull*, 28 id. 364; *Jackson v. West*, 10 John. (N. Y.) 466; *Newman v. Chapman*, 2 Rand. (Va.) 93; *Watkins v. Edward*, 23 Tex. 443; *Knots v. Geiger*, 4 Rich. (S. C.) 32; *Blake v. Graham*, 6 Ohio St. 580; *Schutt v. Lang*, 6 Barb. (N. Y.) 373; *Den v. M'Night*, 13 N. J. L. 43; *Rogers v. Jones*, 8 N. H. 264; *Trull v. Bigelow*, 16 Mass.

406; *Hudson v. Warner*, 2 H. & G. (Md.) 415; *Porter v. Seavey*, 43 Me. 519; *Stewart v. Hall*, 8 B. Mon. (Ky.) 218. In Missouri, *Waldo v. Russell*, 5 Mo. 887, and in Tennessee, *Butler v. Marray*, 10 Humph. (Tenn.) 420, and Virginia, actual notice to subsequent attaching creditors does not affect prior rights nor defeat their attachment or liens. *Guerrant v. Anderson*, 4 Rand. (Va.) 208. When a party is put on inquiry as to the existence of a prior unregistered deed, the question whether he has made due inquiry is one of fact, to be determined by the jury under the instructions of the court; the information obtained by him from proper sources may be proved, though it cannot be used to bear upon the question whether or not there has been such a deed. *Nute v. Nute*, 41 N. H. 60. Mere rumor or suspicion of defect in the title, or an outstanding interest in a third person, is not sufficient to operate as constructive notice; but where the land is claimed under a deed, the guarantee in which openly affects to control it as his property, and pays the taxes assessed upon it, one buying the property with knowledge of these circumstances is chargeable with notice. The presumption of notice is an inference of fact merely, and may be repelled by proof that the purchaser, exercising proper diligence, failed to discover the prior right. *Williamson v. Brown*, 15 N. Y. 354. Possession is such a notice of title in land that an adverse claimant gains no advantage over him in possession by getting his deed first on record. *Wyatt v. Elam*, 19 Ga. 335. It is not in law actual notice of title to land as an equivalent for registry of the deed, but evidence of notice, to be referred to the jury. *Vaughn v. Tracy*, 23 Mis. 415. The notice is merely an inference which may not arise in some cases, and in others may be repelled or restricted to some particular title or claim. Where the entire estate and title of the owner in fee of certain lands had been sold under a judgment, and he remained in possession as before, without any appar-

same rule applies where the purchaser or creditor has knowledge of such facts as *ought* to put him on inquiry;¹ and whether possession by a tenant is of such a character as ought to put a subsequent purchaser upon inquiry is a question of fact for the jury.² As between the lessor and lessee, an unrecorded lease is as valid as though recorded.³ The acknowledgment of a deed must be substantially in conformity to the statute, or the instrument will not be operative as against third persons. Slight and immaterial variations will not affect the validity of the instrument; but *material* variations will be fatal,⁴ even though the instrument is recorded,⁵ but it is good between the parties.⁶

SEC. 219. *Date*.—The date of a lease is not material, as, unless otherwise expressly provided in the instrument

ent change in the character of his possession, it was held that the legal presumption was that he was in by a title derived from the purchaser under the judgment, and that he and those claiming under him were estopped from setting up another title to the premises. *Cook v. Travis*, 22 Barb. (N. Y.) 838. If the purchaser of lands knew that they are in possession of a third party, and is shown certain agreements respecting the land between the vendor and occupant, and is assured by the former that the latter has no claim to the land in law or equity, these facts will in equity amount to full notice of any claim which such occupant really has. *Hull v. Noble*, 40 Me. 459.

¹ *Parks v. Willard*, 1 Tex. 350; *Watkins v. Edwards*, 23 Tex. 619; *Coleman v. Barklew*, 27 N. J. L. 857; *Emmons v. Murray*, 16 N. H. 385; *Harper v. Reno*, 1 Freem. Ch. (Miss.) 323; *Sigourney v. Munn*, 7 Conn. 324.

² *Ponton v. Ballard*, 24 Tex. 619; *Watkins v. Edwards*, ante; *Traup v. Hurlburt*, 10 Barb. (N. Y.) 354; *Jacques v. Short*, 20 Barb. (N. Y.) 269; *Stockton v. Briscoe*, 1 La. An. 249; *Morgan v. Morgan*, 8 Stew. (Ala.) 883; *Taylor v. Eckford*, 19 Miss. 21; *Murrill v. Ireland*, 40 Me. 569. Implied notice

of a prior unrecorded deed may be equally effective with direct and positive notice. Possession of the grantee may be constructive notice. But it must be actual, distinct, and unequivocal, visible and manifested by notorious acts of ownership, such as would naturally be known and observed by others. The mere using for pasture by the grantee and others of land on which there are no buildings, is not such possession. *Coleman v. Barklew*, 27 N. J. L. 857; *Holmes v. Stout*, 10 N. J. Ex. 419.

³ *Culeson v. Blunton*, 8 Hayw. (Tenn.) 152; *Turner v. Stip*, 1 Wash. (Va.) 88; *Cooper v. Day*, 1 Rich. (S. C.) 26; *Stearns v. Morse*, 47 N. H. 532. The purpose of the registry laws is, to give notice as between prior and subsequent purchasers from the same grantor, and not for the purpose of notice to the grantor and grantee. *Galpen v. Abbott*, 6 Mich. 17; *Lawry v. Williams*, 2 Me. 281.

⁴ *Henderson v. Grewell*, 8 Cal. 581; *Fipps v. McGehee*, 5 Port (Ala.) 413; *Stanton v. Button*, 7 Conn. 527; *Vance v. Schuyler*, 6 Ill. 160; *Dauar v. Cardwell*, 27 Ind. 478.

⁵ *Van Cortland v. Tozer*, 20 Wend. (N. Y.) 423; *Allen v. Moses*, 27 Mo. 354; *Odiorne v. Mason*, 9 N. H. 24.

⁶ *Odiorne v. Mason*, ante.

itself, it takes effect *from its delivery*, but the date is *prima facie* evidence of the time when it was executed.¹ And it will be presumed that it was delivered at that time, unless the contrary is proved.² The date is not essential to its validity and may be contradicted.³ If the date is false or impossible, proof of the delivery ascertains the time of it.⁴ If there is no date, it may be shown by parol that it was not to take effect from delivery, but from a future uncertain period.⁵ An actual manual investiture is not necessary in order to constitute a delivery, but the due execution of the lease and delivery to a third person for the use of the lessee,⁶ or any words or acts *that evince an intention that the lease shall be considered as executed and the title parted with*, is sufficient.⁷ Until the lease is delivered to the tenant there is no acceptance of it by him and he is not bound

¹ Colquhoun v. Atkinson, 5 Munf. (Va.) 550; Meech v. Fowler, 14 Ark. 29; Newlin v. Osborne, 4 Jones. (N. C.) L. 157; Costigan v. Gould, 5 Den. (N. Y.) 290.

² Co. Litt. 36; 2 Blackstone's Com. 307; Harris v. Norton, 16 Barb. (N. Y.) 264; Jayne v. Gregg, 42 Ill. 413; Ford v. Gregory, 10 B. Mon. (Ky.) 175; Robinson v. Gould, 26 Iowa 87; Sweetser v. Lamell, 33 Me. 446; but delivery is a question of intention, and almost any manifestation of the party's intention to deliver, if accompanied by an act importing the same, will constitute a delivery, Woodfall's L. & T. 140-1, and is essentially a question for the jury. Lindsay v. Lindsay, 11 Vt. 621; Dearmond v. Dearmond, 10 Md. 19. If the lease is executed by several lessors upon different dates, the presumption that it was delivered on the day of its date is destroyed. Henderson v. Mayor, &c., 8 Md. 352.

³ Blake v. Fosh, 44 Ill. 202.

⁴ Carter v. Strapham, Cowp. 201; Murray v. Stair, 2 B. & C. 82; Hare v. Horton, 5 B. & C. 671; Bawker v. Burdikin, 11 M. & W. 128.

⁵ Davis v. Jones, 17 C. B. 625.

⁶ Stephens v. Huss, 54 Penn. St. 20; Turner v. Whidden, 22 Me.

121; Reid v. Marble, 10 Paige Ch. (N. Y.) 409; Kane v. Machin, 17 Miss. 387; R. R. Co. v. Duff, 13 Ohio St. 235.

⁷ McClure v. Colclough, 14 Ala. 89; Floyd v. Taylor, 12 Ired. (N. C.) L. 47; Rinard v. Walker, 39 Ill. 413. A formal delivery is not necessary to give effect to it; and though left in the possession of the bargainer, it will pass the property embraced by it, if it appear that it was executed *with such intent*. Farrar v. Bridges, 5 Humph. (Tenn.) 44. In Ward v. Ward, 2 Hayw. (N. C.) 226, a father in his lifetime, made a deed of land to his son, but it did not appear that the deed was ever delivered, and it remained in the possession of the father until after his death, when the grantee therein obtained possession of it. The father by his will, disposed of the same land, and those claiming under the will filed their bill to have the deed delivered up to them by the son, and it was so decreed. A delivery to the grantee is not essential. It may be delivered as an escrow, and will take effect on the performance of the condition; and to protect the grantor against intervening rights, relates back to the time of the first delivery. Shirley v. Ayres, 14 Ohio, 307.

by it; as, where the lease is executed and delivered to a third person to be delivered to the tenant when he pays the first month's rent, which he does not do,¹ because, when a condition is attached to the delivery, until such condition is performed by the tenant, or waived by the landlord, no liability under the lease can attach to the tenant, and it cannot be said that the landlord has evinced any intention to part with the title.

SEC. 220. *Entry of lessee.*—By the common law, livery of seizin or an actual possession of the land, was necessary to complete every grant of an estate of inheritance, or for life; but in England,² as well as in most of the States of this country, a lease duly executed, acknowledged and recorded, is equivalent to, and dispenses with, livery of seizin.³ Before entry, a lessee at common law has only an *interesse termini*, and no possession, and, before entry, cannot maintain trespass;⁴ but he may maintain ejectment whenever the legal estate vests in him with a right to immediate possession,⁵ or he may assign his interest, and thus invest his assignee with this

¹ *Witthaus v. Stavins*, 12 Daly (N. Y. C. P.) 226; *Jackson v. Phipps*, 12 John (N. Y.) 418.

² By 8 & 9 Vict. Chap. 106, Sec. 2.

³ *Flint v. Sheldon*, 13 Mass. 443; *Higher v. Rice*, 5 id. 344; *Matthews v. Ward*, 10 G. & J. (Md.) 443; *Bryan v. Bradley*, 16 Conn. 474.

⁴ *Co. Litt.* 296 b; *Harrison v. Blackburn*, 17 C. B. N. S. 678; *Wheeler v. Montefiore*, 2 Q. B. 133. In *Co. Litt.* 296 b; *Comyn's Digest*, *Trespass (B.)*, and in 4 *Bacon's Abr. Tit. Leases, &c.*, (M.) it is laid down as a settled rule that a person cannot maintain trespass *quare clausum* if he has not the actual possession, even though he has the freehold. Therefore neither a grantee, bargainee or lessee of lands, not in possession, can maintain the action. See also *Cook v. Harris*, 1 Ld. Rayd. 387; *Patridge v. Bere*, 5 B. & Ad. 604; *Hitchman v. Walton*, 4 M. & W. 409. There must be possession and a right of possession as against the de-

fendant. *Shepard v. Pratt*, 15 Pick. (Mass.) 33; *Austin v. Sawyer*, 9 Cow. (N. Y.) 39; *Bigelow v. Lehr*, 4 Watts (Penn.) 377; *Chatham v. Brainerd*, 11 Conn. 60; *Brandon v. Grimke*, 1 N. & Mc. (S. C.) 356; *Rowland v. Rowland*, 8 Ohio 40; *Richardson v. Milburn*, 11 Md. 340; *Cann v. Warren*, 1 *Houst. (Del.)* 188; *Bartlett v. Perkins*, 13 Me. 87; *Payne v. Clark*, 20 Conn. 30.

⁵ *Laurissini v. Doe*, 25 Miss. 177; *Parsley v. Day*, 2 Q. B. 156; *Ryan v. Clark*, 14 id. 73; *Cole on Ejectment*, 72, 287. To entitle the tenant to maintain the action, however, his lessor must have had title at the date of the demise, *Whitney v. Bramble*, 9 B. Mon. (Ky.) 143; *Buxton v. Carter*, 11 Mo. 481; *Wood v. Morton*, 11 Ill. 547; *Smith v. McCann*, 24 How. (U. S.) 398; *Jackson v. Huges*, 1 Blackf. (Ind.) 421; *Scissor v. McLaws*, 12 Ga. 166, and the lessee must establish his title and right of possession at the time when the action was commenced. *Layman v.*

right, as the person having the better title can put the other on his defence.' If the lessor had not the right to the possession of all the premises demised so that the tenant could get possession of only part, as, if he had previously sold a part of them, or leased them for a term then unexpired, the lease, as to such part, is wholly void, and, although the tenant enters and enjoys the part thereof which the lessor had the power to lease, the rent is not apportionable, and cannot be distrained for, the impediment of the lessee to getting possession being analogous to an eviction from a part by an elder title' nor will covenant lie against him for the rent because it cannot be apportioned.' But it would seem that if a lease is made of premises by deed poll or indenture, for five years, and there is an outstanding term of a part of the premises for two years, the lease will be void as to the two years, and valid for the remaining three years, if the lessee so elects to treat it.' The tenant's remedy in such

Whitney, 20 Barb. (N. Y.) 559; Pitkin v. Yaw, 13 Ill. 251; Burton v. Austin, 4 Vt. 105; Kite v. Tubles, 32 Cal. 382. Title and seizin are presumed to be united until the contrary is shown. Doe v. Butler, 3 Wend. (N. Y.) 149. A legal title, unless the person in whom it is vested is estopped from asserting it, entitles the plaintiff to recover, whatever may be the equities of the parties, Mitchell v. Robertson, 15 Ala. 412; Winn v. Cole, 1 Miss. 119; Clark v. Lockwood, 21 Cal. 220; Allen v. Smith, 6 Blackf. (Ind.) 527, no matter how it was acquired. N. Y. Dry Docks Co. v. Hicks, 5 McLean (U. S.) 111.

¹Busenius v. Caffer, 14 Cal. 91; Mather v. Munster, 3 S. & R. (Penn.) 509. Only a title superior to the defendant's is required, Garrett v. Lyer, 27 Ala. 586; Cancey v. Cummings, 12 La. An. 748, with an immediate right of possession as against him. Batterton v. Yoakum, Ill. 288.

²Neale v. Mackenzie, 1 M. & W. 747.

³Holgate v. Kay, 1 C. & K. 34.

⁴In 4 Bacon's Abr. Tit. Leases (N), which is said to have been written by LORD CHIEF JUSTICE GILBERT (see opinion of LORD

KENYON, 1 M. & W. page 759), that learned jurist says: "If one makes a lease to A for ten years, and the same day makes a parol lease to B for ten years of the same lands, this second lease is absolutely void, and can never take effect either as a future *interesse termini*, or as a reversionary interest though the first lessee should forfeit or otherwise determine his estate, or though the first lease were on condition, and the condition broken within the ten years; neither shall the lessor have the rent reserved upon such second lease, but such second lease is absolutely void, as if none such had been made. Plow. 421 b, 423 b; Bendl. pl. 246; Cro. Eliz. 160; Plow. 432, 521; Hut. 105; Bro. Tit. Leases, 48; Moor, 185, pl. 329; Dyer, 112, pl. 49. The reason whereof is, because the first lease being made for ten years, the lessor during that time had nothing to do with the possession, or to contract with any other for it; and the second lease being made the same day, and for no longer term than the first ten years, could not pass any interest as a future *interesse termini* certainly; for the first lessee had the whole in-

a case is against the landlord for not giving him possession of the premises, and although he is not liable upon

terest during that time; and his forfeiture or determination of it sooner, which was perfectly contingent and accidental, shall never make good the second lease as a future *interesse termini*, when at the time of making thereof it was absolutely void, for want of power in the lessor to contract for it; and as a reversionary interest it cannot be good, for want of a deed; for a reversion, whether it be granted for life or years, not being capable of executing either by livery of seizin or entry and transmutation of the possession, there can be no evidence of the creation or existence of such a grant, without a deed to ascertain it; and therefore a deed in such a case is as essential to the making good the grant, as livery of seizin or entry in the other cases, where they deal for the possession; and by consequence, this second lease not being good, either as a future *interesse termini* or a reversion, must be absolutely void. But now if such second lease had been made for twenty years, then it had been good as a future *interesse termini* for the last ten years, and void for the first ten years, for the reasons before given. For the last ten years it had been good; because when the first ten years were elapsed, the second lessee might then execute, and reduce into possession by entry, as well as if it had been at first made in possession; for it had been good for the whole twenty years if the first lease had not stood in the way, and that can stand in the way no longer than it continues, and therefore by its determination lets in the second lease. But as a grant of the reversion such second lease could not be good, for want of a deed, for the reasons before given; neither could any attornment help it, or let in the second lease till the first ten years run out by effluxion of time. But if such second lease had been made by deed poll, then it might well enure as a grant of the reversion, and draw after it the rents and services of the first lessee, if he would consent to attorn, and by consequence, when-

ever the first lease determined by surrender, forfeiture, or otherwise, such second lessee having the immediate reversion must come in for the residue of his term; but without such attornment to make it operate as a grant of the reversion, this second lease, though by deed poll, would be absolutely void, as if it were made only by parol, because during the first ten years the lessor had no power to contract for the possession; and therefore if this grant could not take effect as a grant of the reversion, which was all the lessor had a power of, it must likewise be absolutely void. But if such second lease by deed poll had been for twenty years, then with attornment this would be a good grant of the reversion presently, to take effect in possession whenever the first lease determined; or if no attornment could be had, yet it would enure as a future *interesse termini* for the last ten years, and would be absolutely void for the first ten years, as much as if it had been made by parol. But if such second lease for ten years had been made by indenture or fine, then this would have been good as a present lease, by reason of the estoppel to both parties by the indenture or fine, and therefore whensoever the first lease determined, the second lease should commence in possession; and in the meantime the second lessee, by reason of the estoppel, would be obliged to pay the rent reserved in an action of debt. And if such second lessee could prevail for an attornment, then this lease would enure as a grant of the reversion, and draw after it the rents and services of the first lessee, and would take effect in possession whenever that determined; but without such attornment, though the second lease would be good between the parties, by reason of the estoppel, yet not as a reversion; and therefore such second lessee could have no remedy for the rents and services of the first lessee." This view is sustained by LORD KENYON in *Neale v. Mackenzie*, 1 M. & W. 758.

his covenants in the lease, for the rent, he is liable for use and occupation.¹ The rent may be released by the lessor before the lessee has entered, and the lessee may, even before entry, assign his term. If the lessor dies, the right of entry remains in the lessee, and if the lessee dies, his heirs or representatives may enter, because by the lease they presently have an interest in the premises; and if the lease is made to two, and one dies, his interest survives,² and this *interesse termini* is in the lessee whether the lease commences presently or at a future period.³

SEC. 221. **Void or voidable leases.**—A lease may be void at the election of the lessor, and good as against the lessee, or voidable at the election of the lessee and good against the lessor, and *vice versa*;⁴ as, where a lease contains a condition that, for breach of any of the covenants by the lessee the "lease shall cease and determine and be utterly void," the courts hold that, upon breach of a condition, the lease does not *eo instantur* and absolutely become void, but only upon the election of the lessor, or some person in privity with him, because, to hold otherwise, would place it in the power of a lessee, at any time to put an end to his term against the will of the lessor, by "his own wrong;" and the rule applies as well to a

¹ Tomlinson v. Day, 5 Moore, 558; LORD KENYON in Neale v. Mackenzie, 1 M. & W. 764.

² Co. Litt. 46 b, 270 b.

³ Lock v. Furze, 19 C. B. N. S. 96; Comyn's Digest, Tit. Estates (G), 14.

⁴ Dumpor's Case, 4 Coke, 119 b; Roberts v. Davey, 4 B. & Ad. 667; Hughes v. Palmer, 19 C. B. N. S. 393.

⁵ In Arnsby v. Woodward, 6 B. & C. 519, there was a clause of re-entry superadded to the provision for avoidance, and it was held that both were to be construed together, as amounting only to a power of determining the lease by re-entry, and that a subsequent acceptance of rent accruing subsequent to the breach was a recognition of the lease as still subsisting. In Bryan

v. Bancks, 4 B. & Ald. 401, a tenant attempted to insist upon a forfeiture created by his own act, and thereby to convert the term into a yearly tenancy, but the court held that the lease did not become void, unless the lessor elected to treat it so, and that having received subsequently accruing rent, he must be treated as having elected to treat the lease as valid and subsisting. A similar doctrine was held in Rude v. Farr, 6 M. & S. 121, where a tenant attempted to vacate the lease, because of a breach by him of a provision therein, that the lease should become void upon non-payment of the rent as stipulated. See also Nash v. Birch, 1 M. & W. 402; Reid v. Parsons, 2 Chitt. 247; Roberts v. Davey, 4 B. & Ad. 664. The lessee is not per-

lease for years as for life.' When the lessor or his assignees or grantees elects to treat such a lease as void for a breach of any of the covenants, the lease is not avoided from the date of the breach, *but only from the date of the election.*³ The lessor need not re-enter in order to determine the lease, *but he must do some unequivocal act that signifies to the lessee his election to determine it.*⁴ Upon electing to treat the lease as void for a breach, the landlord does not lose his right to sue for rent previously accrued,⁵ or for a breach of a covenant to repair.⁶ When a lease does not provide for a re-entry upon a breach of a condition, and there is no agreement that a failure to perform shall operate as a forfeiture or termination of the lease, the tenant cannot for such cause be said to hold over contrary to the terms of the lease.⁷ If the lessor parts with the reversion *after* a breach, he cannot re-enter nor avoid the lease,⁸ nor can

mitted to take advantage of his own default. *Rude v. Farr*, ante. This subject is treated fully in the chapter on Rent.

³ *Roberts v. Davey*, ante. It was formerly supposed that a distinction existed between leases for lives and for years, in respect to the necessity of an entry to avoid the lease, but, whatever may have formerly been the rule, there is now no distinction, and in order to avoid a lease for a breach, containing a provision rendering the lease void for that cause, it is only necessary that the lessor, or some one in privity with him, should re-enter, or do some decisive act showing his intention to determine the lease, and until such act is done the lease remains in force. LORD DENMAN, C. J., in *Roberts v. Davey*, ante; also opinion of PARKE, J., in the same case. See also *Baylis v. Le Gros*, 4 C. B. N. S. 587; *Matthews v. Smart*, 12 East, 444; *Reed v. Tuttle*, 85 Conn. 25; *Bowman v. Foot*, 29 Conn. 381.

⁴ *Atty.-Genl. v. Cox*, 3 H. L. Cas. 240; *Hartshorne v. Watson*, 4 Bing. N. C. 178; *Johns v. Whittey*, 3 Wils. 127; *Load v. Green*, 15 M. & W. 216; *Franklin v. Carter*, 1 C. B. 750; *Selby v. Browne*, 7 Q. B. 620.

⁵ *Reed v. Tuttle*, 85 Conn. 25; *Bowman v. Foot*, 29 Conn. 381. He may bring ejectment without having previously signified his election, *Hyde v. Watts*, 12 M. & W. 254, except in the case of a lease for life or lives. Co. Litt. 218.

⁶ *Hartshorne v. Watson*, 4 Bing. N. C. 178; *Selby v. Browne*, 7 Q. B. 620; *Waddilove v. Barnett*, 2 Bing. N. C. 538; *Partington v. Woodcock*, 6 Ad. & El. 670.

⁷ *Davis v. Underwood*, 2 H. & N. 573; *Woolcock v. Dew*, 1 F. & F. 837; *Maddock v. Mullett*, 12 Ir. C. L. 173.

⁸ *Pickardt v. Kleis*, 56 Mich. 604.

⁹ *Prior v. Ongley*, 10 C. B. 25; *Matthews v. Smart*, 12 East, 441; *Marriott v. Edwards*, 5 B. & Ad. 1065. A landlord, accepting rent from the assignee of a tenant, is a waiver of any forfeiture because of an assignment without consent. *Church v. Wabash, &c.*, R. R. Co., 22 Mo. App. 315. The plaintiffs had demised certain premises at H to the defendants, and had brought an action of ejectment to recover possession of them; and alleged in their statement of claim that breaches of covenant entailing forfeiture had been committed by the lessees. The defendants contended in their statement of defense that

the assignee or grantee of the reversion avoid the lease for a breach or forfeiture committed before the reversion was conveyed to him.¹ Nor can an entry be made after

the lease sued upon by the plaintiffs contained in its *rec'dendum* clause a provision that on doing the acts complained of (the alleged breaches) the lessees were liable to pay only an extra or penal rent. The plaintiff demurred to the defendants' statement of defense. It was held, on demurrer, that the remedy of the plaintiffs was alternative, and that the right of the plaintiffs to re-enter for breaches of covenant contemplated by the lease was not inconsistent with the proviso for the payment of such extra rent by the defendants, and that the demurrer must be allowed. *Weston v. Metropolitan Asylum Board*, 46 L. T. Rep. (N. S.) 166.

¹ *Matthews v. Smart*, ante. LITTLTON, Sec. 847; Co. Litt. 214 b, says that no entry nor re-entry (which is the same thing) may be reserved or given to any person but only to the donor or lessor, or to their heirs, and such re-entry cannot be given to any other person. And then he puts the case, if one lets to another for life by indenture rendering rent; and for default of payment, a re-entry, &c., if the rent be behind, the grantee of the reversion may distrain for it, but may not enter and oust the tenant, as the lessor or his heirs might have done if the reversion had continued in them. And in this case the right of re-entry is taken away forever, for the grantee cannot enter *causa quâ supra*; and the lessor or his heirs cannot enter; for if the lessor might enter, then he ought to be in his former state, &c., and this may not be because he hath aliened from him the reversion." "Every one," says LORD COKE, Co. Litt. 215 a, "shall take advantage of the condition, in law, broken in his own time. Entry for a forfeiture ought to be by him who is next in reversion or remainder after the forfeited estate; as, if a tenant for life or years commit a forfeiture, he who has the immediate remainder ought to enter, &c." Comyn's Digest, Tit. Forfeiture (A.) 6 & 7. "But he in the next remainder or reversion

shall not enter for the forfeiture if his estate do not continue." 1 Rolle's Abr. 857 l. 45, 50, 858 l. 5. In a word, he who had the estate at the time of the breach, or his heirs, only, can enter for that breach. *Johns v. Whitley*, 1 Wils. 127-140; *Montague's Case*, Cro. Jac. 301. In *Goodright v. Forrester*, 8 East, 552, it was held that a right of entry for a forfeiture is not devisable, and by parity of reasoning it is not demisable; and LORD ELLENBOROUGH in that case says: "It is made a question in the books, who may enter, but it must now be taken to be him who has the right to enter." In Co. Cop., Sec. 60, it is said: "Regularly it is true that none can take the benefit of a forfeiture but he that is lord of the manor at the time of the forfeiture; and therefore if a copy-holder maketh a feoffment and then the lord alieneth, neither the grantor nor the grantee can take benefit of the forfeiture, for neither a right of entry nor a right of action can be transferred from one to another." In New York, under the statute (Revised Statutes 748, §§ 23, 25), it is held that the grantee or assignee of the lessor is entitled to all the remedies which the lessor had when he parted with the reversion. *Van Rensselaer v. Barringer*, 39 N. Y. 9; *Van Rensselaer v. Slingerland*, 26 id. 586. So in New Jersey, by statute of 1851. *Southard v. R. R. Co.*, 26 N. J. L. 18. But at the common law, none but the lessor and his heirs or legal representatives can take advantage of the breach, and this rule generally prevails in this country. *Norris v. Melver*, 20 Ga. 563; *Smith v. Brannan*, 13 Cal. 107; *Vermont v. Society, &c.*, 2 Paine (U. S.) 545; *Davey v. Williams*, 40 N. H. 222; *Winn v. Cole*, 1 Miss. 119; *Parker v. Nicholls*, 7 Pick. (Mass.) 111; *Cross v. Carson*, 8 Blackf. (Ind.) 138; *Hooper v. Cummings*, 45 Me. 389; *Cornelius v. Ivins*, 26 N. J. L. 376. A liability for rent due before an assignment of the lease cannot be enforced against the as-

forfeiture has been waived,¹ but an entry may be made at any time *after* a breach, and *before* a waiver.² Bringing an action of ejectment is equivalent to entry, and is an election to determine the term, so that from the time

signee. *Johnston v. Bates*, 48 N. Y. Super. Ct. 180. If, in defence to one's action against his lessee's tenant for rent, the lease is set up, the plaintiff may allege in reply, and prove a rescission of the lease. *Moberly v. Peek*, 67 Ala. 845. Between a landlord and his tenant's sub-tenant there is neither such privity of estate nor of contract, as to entitle the landlord to collect by distress warrant, against produce raised by the sub-tenant, rent due under a contract between the latter and the tenant. *Gibson v. Mullican*, 58 Tex. 490. A purchaser at sheriff's sale of the unexpired term of a lease takes the lessee's place under the lease, and therefore becomes liable for taxes on improvements placed on the land, in the same manner as the original lessee would have been liable. In *Re Huddell*, 16 Fed. Rep. 373.

¹ *Baylis v. Le Gros*, 4 C. B. N. S. 537; *Griffith v. Pritchard*, 5 B. & Ad. 765; *Davis v. Burrell*, 10 C. B. 821; *Arnsby v. Woodward*, 6 B. & C. 519. As to what constitutes a waiver, see post *Forfeiture*. Although a lessor accepting rent after the failure of the lessee to pay taxes waives his right to claim a forfeiture for such failure, the continued failure to pay the taxes within a reasonable time after the receipt of the rent by the lessor occasions a new forfeiture. *Conger v. Duryee*, 24 Hun (N. Y.) 617. An agreement, by a tenant, to convey a greater interest than his lease gives him, does not work a forfeiture. *Griffin v. Fellows*, 81* Pa. St. 114.

² *Davis v. Burrell*, ante. No intimation of an election on the part of the lessor is necessary as a preliminary to bringing ejectment, *Hyde v. Watts*, 12 M. & W. 254; nor can the lessor elect to put an end to the lease after he has waived the forfeitures. *Griffith v. Pritchard*, 5 B. & Ad. 765. Where the landlord brings an action for the rent, *Dendy v. Nicholl*, 4 C. B. N.

S. 376, or a distress, *Doe v. Peck*, 1 B. & Ad. 428; *McKildoe v. Durra-cott*, 18 Gratt. (Va.) 278, or accepts rent accruing subsequent to the breach, *Doe v. Rees*, 4 Bing. N. C. 348; *Griffith v. Pritchard*, ante, he waives the forfeiture as a matter of law, and no words of his at the time of receiving the rent can prevent such legal effect. *Croft v. Lumley*, 5 E. & B. 648. But acceptance of rent accruing *before* the forfeiture was incurred, or after ejectment brought, does not amount to a waiver. *Price v. Worward*, 1 H. & N. 512; *Jones v. Carter*, 15 M. & W. 718. An absolute and unqualified demand of rent due after a forfeiture made either by the landlord or a person authorized by him to make it, operates as a waiver, *Nash v. Birch*, 1 M. & W. 408, opinion of PARKE, B., and an acceptance of rent accruing *after* the forfeiture, even *after the landlord has re-entered*, has been held to operate as a waiver. *Coon v. Brickett*, 2 N. H. 164. In order to operate as a waiver, not only must it be shown that rent accruing after the breach was received by the landlord, but also, that he received it knowing of the breach, *Jackson v. Allen*, 8 Cow. (N. Y.) 220; *Jackson v. Bronson*, 7 John. (N. Y.) 227, and where it was paid to an agent, it was held that his knowledge of the breach was not enough. *Jackson v. Schutz*, 18 John. (N. Y.) 174. An agreement by the landlord to grant a new lease after the expiration of the term in respect of which the forfeiture was incurred, *Ward v. Day*, 5 B. & S. 859, or advising a third person to buy the lease of the lessee, the landlord knowing of the forfeiture, is a waiver. *Doe v. Eykins*, 1 C. & P. 154. Where the breach is continuous, the receipt of rent or other acknowledgment of tenancy will not preclude the landlord from taking advantage of a forfeiture incurred subsequently. *Doe v. Jones*, 5 Exchq. 498; *Doe v. Woodbridge*, 9 B. & C. 876.

of its commencement the rent ceases.¹ Where a tenant goes into possession under a void lease, or agreement for a lease, and pays rent, he becomes a tenant from year to year upon such of the terms of the lease, or agreement for a lease, as are consistent with such a tenancy,² and the tenancy so implied will terminate without notice to quit, at the end of the term named in such void instrument.³ Actual *payment* of rent is not indispensable to convert an occupancy under a void lease into a tenancy from year to year. It is enough if the tenant recognizes his liability to pay, and the rent is permitted to stand over by mutual consent,⁴ as payment of rent does not create, but is merely evidence of such a tenancy,⁵ and the presumption arising from such payment may be rebutted.⁶ Of course, if the lessee does not enter under a void lease, no action lies against him for the rent or for not taking possession,⁷ nor against the landlord for refusing to let the tenant into possession.⁸

SEC. 222. What acts of the parties invalidate a lease. Alterations, erasures, interlineations, filling blanks, &c.—A lease

¹ Jones v. Carter, 15 M. & W. 718; Franklin v. Carter, 1 C. B. 750.

² Lee v. Smith, 9 Exchq. 665; Cumberland v. Glavis, 15 C. B. 348; Bolton v. Tomlin, 5 Ad. & El. 856; De Medina v. Palson, Holt, N. P. 47; Waukley v. Bucknell, Cowp. 473; Mann v. Lovejoy, 1 Ad. & El. 52; Beale v. Sanders, 3 Bing. N. C. 856; Riggs v. Bell, 5 T. R. 471; Doe v. Amey, 12 Ad. & El. 476; Cox v. Bent, 5 Bing. 185; Knight v. Bennett, 3 id. 861; Bennett v. Ireland, 3 E. B. & E. 336; Clayton v. Blakely, 8 T. R. 3; Doe v. Watts, 7 id. 83; Braythwaite v. Hitchcock, 10 M. & W. 494; Doe v. Foster, 3 C. B. 215; Doe v. Collings, 7 C. B. 939; Doe v. Smith, 11 M. & Ry. 137; Chapman v. Towner, 6 M. & W. 100; Doe v. Taniere, 12 Q. B. 998.

³ Tress v. Savage, 4 E. & B. 36; Doe v. Stratton, 3 C. & P. 164; Doe v. Moffatt, 15 Q. B. 257.

⁴ Vincent v. Godson, 34 L. J. Ch. 122; Cox v. Bent, ante.

⁵ Finlay v. Bristol, &c., R. R. Co.,

7 Exchq. 415; Jones v. Shears, 4 Ad. & El. 832.

⁶ Lord v. Crago, 6 C. B. 90. When the issue is whether the defendant ever promised to pay rent to the plaintiff, and the evidence on the question is conflicting, the defendant cannot adduce evidence of circumstances tending to show that it was neither reasonable nor probable that he would make such promise; consequently a charge requested by him, asserting that if he had been in open and uninterrupted possession of the premises for more than ten years, claiming them as his own under a verbal gift, and paying rent to no one, "the jury may look to this fact, in connection with all the other evidence in the case, in order to determine whether he promised to pay rent to plaintiff," is erroneous. Swann v. Kidd, 78 Ala. 178.

⁷ Edge v. Strafford, 1 C. & J. 391; Iman v. Stamp, 1 Stark. 12.

⁸ Jinks v. Edwards, 11 Exchq. 775.

by deed may be invalidated by unauthorized or fraudulent erasure, interlineation or alteration therein in any material respect,¹ but not by one made before delivery or by the consent of all the parties, simply to express what was

¹ But a destruction of the lease by the lessee, or a fraudulent alteration in an immaterial respect, will not defeat his estate, *Barrett v. Thorndike*, 1 Me. 73; *Doe v. Bingham*, 4 B. & Ald. 677; *Woodward v. Aston*, 1 Vent. 297; nor if it is altered by consent of the parties; but upon redelivery it is good without re-acknowledgment. *Bassett v. Bassett*, 55 Me. 125. But an unauthorized material alteration destroys its validity, *Rex v. Beck*, 2 Stra. 1160; *Miller v. Maynwaring*, Cro. Car. 399, and one of two grantors cannot confer authority as against his co-grantor. *Bassford v. Pearson*, 9 Allen (Mass.) 887. In South Carolina it has been held that an alteration made by consent of all parties in a deed previously delivered, is inoperative. *Booker v. Stivender*, 18 Rich. (S. C.) 85; *Pigot's Case*, 11 Coke, 26 a. As applied to bonds, the rule as stated in the text has been repeatedly held, and the same principle applies to leases, deeds or simple contracts, and a material alteration, erasure or interlineation destroys the instrument, *Wood v. Hildebrand*, 46 Mo. 284; *Bell v. Quirk*, 8 N. J. L. 312; *Miller v. Stewart*, 4 Wash. (U. S.) 26; *Pumy v. Corwithe*, 18 John. (N. Y.) 499; *Heffelfinger v. Shute*, 16 S. & R. (Penn.) 44; *Berry v. Berry*, 2 J. J. Marsh. (Ky.) 487, and defeats the estate if done by the lessee or grantee fraudulently. Thus in *Bliss v. McIntyre*, 18 Vt. 466, it was held that if a lessee fraudulently alters his lease in a material part subsequent to its execution, he thereby destroys all his future right under the lease to retain possession of the premises or to preclude the lessor from re-entering upon them. And if the lessor or grantor fraudulently makes the alteration, the land passes discharged from the covenants, and a recovery cannot be had upon the original contract for use and occupation, independent of the deed, nor will equity relieve and compel a redelivery of

the premises or payment of the rent. *The estate of the person making the alteration is destroyed as a penalty of his fraud* and his assignee stands in no better relation. *Arrison v. Harmstead*, 2 Penn. St. 191. The rule seems to be, that, where a contract is reduced to writing, whether under seal or not, so as to merge the original promise, and the written agreement is so altered without authority from the parties thereto as to avoid it, the party making the alteration cannot resort to the original contract. *Mills v. Starr*, 2 Bailey (S. C.) 359; *Newell v. Mayberry*, 8 Leigh. (Va.) 250; *Wheelock v. Freeman*, 18 Pick. (Mass.) 165; *Jackson v. Malin*, 15 John. (N. Y.) 298; *Nunnery v. Cotton*, 1 Hawks (N. C.) 222; *Lewis v. Payn*, 8 Cow. (N. Y.) 71; *Wright v. Wright*, 7 N. J. L. 175; *Smith v. Mace*, 44 N. H. 553; *Bigelow v. Stutphen*, 35 Vt. 521. But, where the alteration is not fraudulently made, it will not cancel a debt of which the instrument was evidence. *Vogle v. Ripper*, 34 Ill. 100. And in *Woods v. Hildebrand*, 46 Mo. 284, it was held that, when a grantee, after delivery to him of his deed, alters the description of the land, the title is not thereby re-conveyed to his grantor. But that the title having passed by the deed, its continued existence or integrity is not essential to the title, although the alteration is fraudulent; but that the instrument only is destroyed, so that no action lies upon its covenants, and there can be no question but that this is the rule as to deeds, because the destruction of the instrument, even by the consent of the parties, after the estate has vested, does not divest the title. *Linker v. Long*, 64 N. C. 296; *Parshall v. Shirts*, 54 Barb. (N. Y.) 99. But if the title or estate never vested under the conveyance, the rule is otherwise. *Upton v. Archer*, 41 Cal. 85. Therefore it would at least seem that, where the lessee has never taken possession

intended by the parties, especially if the deed is redelivered;¹ nor by immaterial alteration, although fraudulently made.² The rule may be said to be, that an alteration of a lease or deed after execution, *which does not operate upon the provisions of the deed, or the parties who previously executed it*, will not avoid the deed, but it will be valid against those executing before as well as after the alteration.³ Nor is a lease or deed destroyed by an alteration made therein by a stranger, without the privity of the party relying upon it.⁴ An alteration in an instru-

under his lease, and it is refused him, either by the lessor or a stranger, he is without remedy, as both the lease and the estate have been destroyed by the material alteration. In the case of a lease, the subject-matter lies in grant so that the estate cannot exist without the deed, because it is of the essence of the estate. Any alteration, material or immaterial, *if made by the lessee or a person claiming under him*, avoids the lease as to him to all intents and purposes, and not only his remedy but his estate is lost. *Lewis v. Payn*, 8 Cow. (N. Y.) 71; *Bliss v. McIntyre*, ante. But a rent is created by duplicate deeds, one being in the hands of each party. Even though the grantee alters his deed in a material part, neither the remedy nor the estate is lost, for, though his deed is avoided, yet both were original, and the grantor's deed will support the estate. *Lewis v. Payn*, ante.

¹ *Bassett v. Bassett*, ante, see preceding note, *Doe v. Houghton*, 1 Man. & Ry. 208; *Lewis v. Payn*, 8 Cow. (N. Y.) 71; *Ravies v. Alston*, 5 Ala. 297; *Bank v. Hall*, 14 N. J. L. 533; *Stewart v. Preston*, 1 Fla. 10; *Boston v. Benson*, 12 Cush. (Mass.) 61. It takes effect from the date of alteration as a new contract. *Still v. Probst*, 69 Ill. 383.

² *Barrett v. Thorndike*, 1 Me. 73; *People v. Muzzy*, 1 Den. (N. Y.) 239; *Pequaket Bridge v. Mathes*, 8 N. H. 139; *Van Burnt v. Van Burnt*, 3 Edw. Ch. (N. Y.) 14; *Burnham v. Ayer*, 35 id. 351; *Nicholls v. Johnson*, 10 Conn. 192; *Herrick v. Mulin*, 22 Wend. (N. Y.) 383; *Huntington v. Finch*, 3 Ohio St. 445; *Jackson v. Mulin*, 15

John. (N. Y.) 293. But there are cases in which it is held that an immaterial alteration, *fraudulently* made by the party claiming under it, avoids it so far as respects the remedy by action upon it. *Nunnery v. Cotton*, 1 Hawks (N. C.) 222; *Jackson v. Mulin*, 15 John. (N. Y.) 293; *Wright v. Wright*, 7 N. J. L. 175; *Morris v. Vandoren*, 1 Dall. (U. S.) 67; *Moye v. Herndon*, 30 Miss. 110.

³ *Lewis v. Bingham*, 4 B. & Ald. 674; *Whiting v. Daniel*, 1 H. & M. (Va.) 890. It has long been settled that, after a lease or deed has been duly executed, and the estate is vested under it, that the destruction of the instrument by the lessee or grantee does not divest the estate, *Woodward v. Aston*, 1 Ventr. 297; *Lewis v. Bingham*, ante; *Bolton v. Bishop of Carlisle*, 2 H. B. L. 268; *Buller's Nisi Prius*, 267, even though it was done fraudulently and with a wrongful intent. *Barrett v. Thorndike*, 1 Me. 73. And where a deed is offered in evidence, not to charge any one with a duty, or to operate anything, but to show *what has been operated* during the time that it existed as an impeachable instrument, no alteration, material or immaterial, is an objection to its being received.

⁴ As to whether an alteration by a stranger, without the knowledge of the lessee or grantee, will destroy the instrument, has been variously decided; but MR. SUGDEN, in his treatise on Powers, p. 400, upon the authority of *Henfree v. Bromley*, 6 East, 309, lays down the doctrine, that a deed altered in a material part by a stranger does not become void. The case

ment is a change in its meaning or purpose, and any change therein that does not vary its meaning cannot be

of *Henfree v. Bromley*, it is true, related to an award, which is not necessarily a deed, but it is quite difficult to conceive of a principle upon which it can be held that the mere spoilation by a stranger shall not avoid an award, but *shall* avoid a deed. *Waugh v. Russell*, 5 Taunt. 707, is an authority in support of MR. SUGDEN's rule, to the extent that an *immaterial* alteration by a stranger does not avoid the lease, and LORD ELLENBOROUGH, in his remarks in *French v. Patton*, 9 East, 355, seems to assent to the doctrine of *Henfree v. Bromley*, as to alterations made by a stranger, and the case of *Zouch v. Claye*, 2 Lev. 35, is a full authority, holding that an *immaterial* alteration does not avoid, *Sanderson v. Symonds*, 1 Brad. & B. 426, where an alteration made in an insurance policy by the insured, was held not to vitiate it. *So Com. v. Savings Bank*, 98 Mass. 12, where a bond stolen and the number altered by the thief, was held not to be invalidated thereby. *So Kendall v. Kendall*, 12 Allen (Mass.) 92, where a mortgage was held not to be invalidated as against the mortgagor by the fraudulent addition by the grantee of the name of the grantor's wife, as a party signing the same, for the purpose of releasing her dower, *she being dead*, so that no rights were effected or defeated thereby. In *Rees v. Overbaugh*, 6 Cow. (N. Y.) 746, it was held that a deed was not avoided by a stranger's tearing off the seal, and that an alteration by a stranger, *although material*, will not avoid the deed. See *Nicholls v. Johnson*, 10 Conn. 192, where the addition of the words "Sales at auction, 6th March, 1826," to a memorandum of sale, by the auctioneer, did not avoid the instrument. CHURCH, C. J., in delivering the judgment of the court, said: "Whether the alteration in the memorandum, if material, was made by the plaintiff or a stranger, does not appear. It is said in *Pigot's Case*, 11 Co. 27, and also in *Markman v. Gonaston*, Cro. Eliz. 626, that "when any deed is altered in a point material,

by the plaintiff himself, or by any stranger, without the privy of the obligee, be it by interlineation, addition, erasing, or by drawing a pen through a line, or through the midst of any material word, the deed thereby becomes void." This doctrine, not without good reason, has been supposed to have been derived from the ancient technical forms of pleading in cases of deeds, and from principles applicable to *proferts*. *Read v. Brookman*, 8 T. R. 151; *Masters v. Miller*, 4 T. R. 321. But whatever may have been the origin of this principle, it has been much relaxed, if not entirely subverted, in later times, so far as it extends to the acts of strangers. As early as the reign of Car. 2, it was decided, that a deed was not made void, the seal of which had been torn off by a little boy. *Palm*, 413. Before the case of *Read v. Brookman*, 8 T. R. 151, it was uncertain how far a *profert* could be dispensed with, in a court of law: and in that case it was, for the first time, settled, that the loss or destruction of a deed would excuse a *profert*; and that a resort to a court of equity, in such cases, was not necessary. More recently it has been holden, that an alteration of a written instrument, by mistake, will not defeat it. *Chitty on Cont.* 298; *Raper v. Birkbeck*, 15 East, 17; *Wilkinson v. Johnson*, 2 B. & C. 428. In the case of *Henfree v. Bromley*, 6 East, 310, the court of King's Bench decided, that where an umpire, after the expiration of his power, had altered an award in a material part, such award was not thereby rendered void, but was good as before the alteration. In the case of *Jackson v. Malin*, 15 John. (N. Y.) 293, it was said, by PLATT, J., "that a material alteration, though made by a stranger, without the privy of the party claiming under it, renders the deed void, is a proposition to which I am not ready to assent." And in a still later case of *Rees v. Overbaugh*, 6 Cow. (N. Y.) 746, this subject was discussed, and it was held, that if a stranger tears a seal from a deed, it shall not destroy it. And no

said to be an alteration, and, consequently, does not affect its validity ;¹ and, where the law would supply the matter added, or where it does not change *the meaning, character or purpose* of the instrument, it is immaterial, and may be treated as surplusage.² Where erasures, interlineations or

distinction exists in this respect between deeds and other written instruments. *Masters v. Miller*, ante. The reasons controlling the decisions in the cases referred to, seem entirely applicable to the present, and *wholly inconsistent* with the old doctrine of *Pigot's Case*, ante, *in its application to the acts of strangers to the deed*. Indeed it can hardly be conceived, if a deed or other instrument in writing is not rendered inoperative by either a *mistaken alteration, or its loss or destruction*, how it can be by the *unauthorized intermeddling of a stranger*. To the same effect see *Waring v. Smith*, 2 Barb. (N. Y.) Ch. 119; *Harris v. Bradford*, 4 Ala. 214; *Lee v. Alexander*, 9 B. Mon. (Ky.) 25; *Malin v. Malin*, 1 Wend. (N. Y.) 625; *Smith v. McGowan*, 8 Barb. (N. Y.) 404; *Terry v. Hazlewood*, 1 Duv. (Ky.) 104; *Wilks v. Caulk*, 5 H. & J. (Md.) 86; *Wright v. Wright*, 6 N. J. Eq. 175; *Lewis v. Page*, 8 Cow. (N. Y.) 71; *United States v. Hatch*, Paine (U. S.) 336; *Bigelow v. Stilphen*, 35 Vt. 521, and especially is this so if the original tenor of the instrument can be ascertained. *Lubbering v. Kohlbrecker*, 22 Mo. 590; *Davis v. Carlile*, 6 Ala. 707; *Medlin v. Platte Co.*, 8 Mo. 235; *Croft v. White*, 36 Miss. 455.

¹ In *Morrill v. Otis*, 12 N. H. 466, it was held that memoranda upon a plan, that certain persons desired to purchase one of the lots, and to whom and when it was sold, but not varying the courses and distances of the lines of the lots, nor the relative situation of the lots to each other, did not constitute an *alteration* of the plan. *Pequaket Bridge v. Mathes*, 8 id. 189; *Burnham v. Ayer*, 35 id. 351; *Nicholls v. Johnson*, 10 Conn. 192. A change in the character of the instrument, as by annexing a seal to the name of a party, thus making the instrument a specialty, or tearing off a seal and thus reducing it

to a simple contract, is an alteration that is material and avoids the instrument as to the party doing it. But if done by a stranger without the privity of the parties, *Rees v. Overbaugh*, 6 Cow. (N. Y.) 746, or accidentally, as when they are brushed off, or torn off by a child, the validity of the instrument is not affected. *Zouch v. Claye*, 1 Palm. 418. An alteration of the date of a lease is not material, unless the date is made material either as to the commencement or duration of the term, *State v. Miller*, 3 Gill (Md.) 335; *S. P. Owings v. Arnott*, 33 Mo. 406; *Hocker v. Jamison*, 2 Watts & S. (Penn.) 438; nor when the rights of the parties are not affected thereby, or the legal effect of the instrument is not changed. *Hunt v. Adams*, 6 Mass. 519. An alteration of the amount of the rent to be paid is material, *State v. Boring*, 15 Ohio St. 507; *Mathis v. Mathis*, 3 Dev. & B. (N. C.) L. 60, or of the time or mode of payment. *Darwin v. Rippey*, 63 N. C. 818. So an alteration that changes the duration of the term, or the character of any of the covenants, conditions, reservations or exceptions therein, avoids the instrument as to the party making the alteration or causing it to be made.

² *Burnham v. Ayres*, 35 N. H. 351; *Jackson v. Molin*, 15 John. (N. Y.) 293; *People v. Muzzy*, 1 Den. (N. Y.) 289. As applied to bonds. *Reed v. Kemp*, 16 Ill. 445; *Terry v. Hazelwood*, 1 Dur. (Ky.) 104; *Stone v. Wilson*, 4 McCord (S. C.) 203; *Fulton's Case*, 7 Cow. (N. Y.) 484; *Kendall v. Kendall*, 12 Allen (Mass.) 92; *Hatch v. Hatch*, 9 Mass. 307; *Shelton v. Deering*, 10 B. Mon. (Ky.) 405; *Wilkes v. Caulk*, 5 H. & J. (Md.) 86; *Bird v. Bird*, 40 Me. 398, and the *intent* with which the charge was made, will not alter the legal effect. *Robinson v. Phenix Ins. Co.*, 25 Iowa, 480. In *Herrick v. Baldwin*, 17 Minn. 209, 10 Am. Rep. 161, the

alterations appear upon the face of an instrument, common prudence requires that the party receiving it should see to it that they are properly noted in the attestation, and thus avoid the possible contingency of being compelled to explain them.¹ Indeed in some of the States, where an instrument upon its face appears to have been altered, it is presumed that it was done subsequent to its execution,² while in others it is presumed, in the absence of any suspicious circumstances, to have been done *before* or at the time of its execution,³ and in others, there is no presumption one way or the other, but it is a question for the jury *when* the alterations were made, unless there is evidence upon the face of the instrument, intrinsic or extrinsic, that furnishes ground of suspicion.⁴ But generally, it may be regarded as the rule that, where an

defendant indorsed a promissory note for the accommodation of the maker, who afterward, and without the knowledge of defendant, changed the note, by adding to the body of it the following words; "Payable before maturity, and interest on unexpired term refunded if I so elect" and negotiated it to plaintiff who was a *bona fide* holder thereof, for value, and without notice of the alteration. It was held, that the alteration was immaterial as to the defendant, and that his liability was not affected thereby. In an action by the administrators of the payee of a promissory note made in 1859 and payable "in gold" against the sureties thereto, the latter interposed the defence that the words "in gold" were inserted by the payee without their knowledge or consent after delivery. It was held, that the alteration did not change the legal liability of the sureties, and that they were therefore liable. *Bridges v. Winters*, 42 Miss. 135; 2 Am. Rep. 598. See also *Falmouth v. Roberts*, 9 M. & W. 469, where a tenant who had entered and become a tenant from year to year, subsequently entered into an agreement for a lease with the landlord for seven years. He altered the word "seven" in the agreement to "fourteen." The court held that the agreement

might be put in evidence without explanation of the erasure, because the term of years was immaterial to the parol contract to hold from year to year, subject only to the terms of the agreement as to the cultivation of the land.

¹ *Hodge v. Gilman*, 20 Ill. 437.

² *Burnham v. Ayres*, 35 N. H. 351; *Mortag v. Linn*, 23 Ill. 551, and the burden is held to be upon the person having the possession of the instrument to explain any apparent alteration, *Burton v. Pressly*, 1 Cheeves (S. C.) Part 2, 1, or who is to be benefitted thereby. *Jordan v. Stewart*, 28 Penn. St. 244; *Ely v. Ely*, 6 Gray (Mass.) 439; *Roberts v. Unger*, 30 Cal. 676.

³ *North River Meadow Co. v. Shrewsbury Church*, 22 N. J. L. 424; *Stover v. Ellis*, 152; *Beaman v. Russel*, 20 Vt. 205; *Matthews v. Coalter*, 9 Mo. 705; *Farnsworth v. Sharp*, 4 Sneed (Tenn.) 55; *Maybee v. Sniffen*, 2 E. D. S. (N. Y. C. P.) 1; *Little v. Herndon*, 10 Wall. (U. S.) 26.

⁴ In *Cole v. Hills*, 44 N. H. 227, it was held that, where a material alteration is apparent on the face of an instrument, and is not noted as being made at or before the signing, the instrument may be put in evidence before the jury, without previous evidence of the time of the alteration, or explanatory thereof. In such case the

interlineation or alteration appears upon the face of the instrument, attended with any suspicious circumstances, the party relying upon it should show either that it was not altered by him, or, if so, that it was done with the consent of the other party,¹ and the question as to whether it was made before or after execution must be submitted to the jury.² The unauthorized filling of blanks left in an instrument avoids it as to those cognizant of the alterations;³ but, where a person makes and delivers to a third person an instrument, with the name of the grantee left blank, with verbal authority to him to fill such blank with the name of a certain person as grantee, the deed is good and operative to convey the estate;⁴ and there would seem to be no good reason why, if the blanks are only filled according to the

instrument, with its full history, the appearance of the alteration, the possible motives for and against it, and its effect on the respective parties, should be submitted to the jury, for them to determine when it was made, and whether fraudulently or not, and the presumption that the alteration was made after the execution of the note is one of fact for the jury, and not of law for the court. In *Wicker v. Pope*, 12 Rich. (S. C.) 387, it was held that whether an instrument was altered or not is a question for the jury, and that the person offering it is not called upon to explain, but may rely on the appearance of the instrument. See also *Parker v. Moore*, 29 Miss. 218; *Ellison v. Mobile, &c., R. R. Co.*, 36 id. 572.

¹ *Croft v. White*, 36 Miss. 455; *Huntington v. Fitch*, 3 Ohio St. 445. Where an alteration appears on the face of a written instrument, it will, as a general rule, if nothing appears to the contrary, be presumed to be contemporaneous with the execution of the instrument; but if any ground of suspicion is apparent on the face of the paper, the law presumes nothing, but leaves the question of the time when it was done, as well as that of the person by whom, and the intent with which it was done, as matters of fact to be found by the jury, upon proof by the party

offering the instrument in evidence. *Matthews v. Coalter*, 9 Mo. 705; *Maybee v. Sniffen*, 2 E. D. Smith (N. Y.) 1; *Farnsworth v. Sharp*, 4 Sneed (Tenn.) 55; *Beaman v. Russell*, 20 Vt. 205; but in *Croft v. White*, ante, where the alteration was not made in the handwriting of any of the parties, it was held that the court would presume that it was made by a stranger.

² *Hunt v. Gray*, 35 N. J. L. 227; *Jackson v. Osborn*, 2 Wend. (N. Y.) 555; *Norwood v. Fairservice*, Quincy (Mass.) 189.

³ But only those claiming in right of the grantor can avail themselves of such an objection. *McNab v. Young*, 81 Ill. 11; *Cooper v. Page*, 62 Me. 192.

⁴ *Field v. Stagg*, 52 Mo. 534; *Pence v. Arbuckle*, 22 Minn. 417; *Furnas v. Durgin*, 119 Mass. 500; but if the agent fills the blank by inserting the name of some other person as grantee, the deed will be void. *Upton v. Archer*, 41 Cal. 85; *Clark v. Allen*, 34 Iowa, 190; *Schmitz v. McManamy*, 33 Wis. 299. But *contra* and holding that a deed left blank as to the grantee and filled up after acknowledgment, conveys no title. *Diser v. Rice*, 33 Tex. 139. See, holding that such alteration does not vitiate the deed, *Devin v. Hiner*, 29 Iowa, 297.

intention of the parties, the instrument should be invalidated, even though the blanks are filled by the grantee himself,' as the lessor or grantor, by delivering the instrument with material blanks, should be regarded as impliedly authorizing the grantee or lessee to fill them according to the intent of the parties.' The cancellation or destruction of a lease for a term by the mutual assent of the parties, is held not to divest the lessee of his term where the lease is by deed, and all the remedies *that can be upheld without production of the deed* to either party are left the same as though the lease had not been destroyed,' nor is it evidence of a surrender by deed.' If the validity of the lease is expressly made to depend upon the happening of a certain event, it is invalid if such event does not occur.' So, too, it may be invalidated by the judgment of a court of competent jurisdiction.' So it may become void by the breach of any covenant, by the breach of which it is expressly declared to be void.' So

¹ *Ives v. Farmers' Bank*, 2 Allen (Mass.) 236; but in *Burns v. Lynde*, 6 id. 305, as well as in *Cross v. State Bank*, it was held that authority to fill up and deliver a deed executed in blank must be conferred by writing under seal.

² In *South Berwick v. Huntress*, 53 Me. 89, it was held that a person who executes and delivers a deed, bond or other instrument as his deed, &c., *knowing* that there are blanks to be filled, must be treated as agreeing that the blanks may be filled according to the contract, and although this does not seem to be the generally accepted doctrine of the courts, yet there is no valid objection to it. Nothing but merely technical notions can be opposed against it.

³ *Stewart v. Astor*, 8 Ir. C. L. N. S. 35; *Roe v. Archbishop of York*, 6 East, 86; *Ward v. Lumly*, 7 H. & N. 86. The covenants are destroyed but the estate is not thereby reverted in the grantor, *Wiley v. Christ*, 4 Watts (Penn.) 199; *Hatch v. Hatch*, 9 Mass. 307; *Jackson v. Page*, 4 Wend. (N. Y.) 585; *Cheesman v. Whittemore*, 23 Pick. (Mass.) 241; *Grayson v. Richards*, 10 Leigh (Va.) 57;

Lawrence v. Lawrence, 24 Mo. 269; *Gilbert v. Bulkly*, 5 Conn. 262; *Jordan v. Jordan*, 14 Ga. 145; *Morgan v. Elam*, 4 Yerg. (Tenn.) 875; even though the parties so intended. *Parker v. Cane*, 4 Wis. 1; *Lawcett v. Kimmey*, 33 Ala. 261; *Lawton v. Gordon*, 34 Cal. 36; *Carver v. McNulty*, 89 Penn. St. 473; *Listoff v. Hart*, 25 Miss. 245; *Wilson v. Hill*, 13 N. J. Eq. 143; *Scheffer v. Tithian*, 17 Ind. 463. But in New Hampshire, Maine and New Jersey it has been held that the cancelling of an unrecorded deed by mutual consent reverts the estate, *Mussey v. Holt*, 24 N. H. 248; *Nason v. Grant*, 21 Me. 160; *Faulks v. Burns*, 16 N. J. Eq. 250; and, if the rights of third persons have intervened in consequence of such cancellation, the grantee, as against them, may be estopped from setting up his title. *Holbrook v. Tirrell*, 9 Pick. (Mass.) 105; *Wiley v. Christ*, ante. See *Raynor v. Wilson*, 6 Hill (N. Y.), 469.

⁴ *Doe v. Thomas*, 9 B. & C. 288.

⁵ *Woodfall's L. & T.* 152.

⁶ 2 *Blackstone's Com.* 308.

⁷ *Hartshorne v. Watson*, 4 Bing. N. C. 178; *Davies v. Underwood*,

where the premises were leased for an unlawful purpose, the landlord *knowing* that they were to be so used, even though the lease contains an express covenant against such use, the lease would doubtless be void.¹ But although a lessee intending to use premises for an unlawful purpose represents falsely that he intends to devote them to a lawful purpose, and thereby procures the lease, it is not void, although 'if the matter rested in contract merely it would doubtless be a good defence to an action for not granting the lease.' But it is held that, where a lease is made by an agent, the fact that *he* knows that the premises are to be used for an unlawful purpose, the landlord *not knowing* the fact, contrary to the general rule, will not render the lease void as to him, or prevent him from recovering the rent, as, in such cases, the knowledge of the agent is not imputed to the principal.²

² H. & N. 573; Woolcock v. Dew, 1 F. & F. 337.

¹ Gas Light Co. v. Turner, 5 Bing N. C. 666.

³ Feret v. Hill, 15 C. B. 207; see also S. P. Stewart v. Astor, 8 Ir. C. L. N. S. 85.

⁴ Calvaleiro v. Puget, 4. F. & F. 537.

⁵ In Stanley v. Chamberlain, 39 N. J. L. 565, the agent of plaintiff, who was the owner of real estate, rented the premises to the defendant, knowing that he intended to use them for gaming purposes. Plaintiff had no actual knowledge of the intended use. In an action for the rent the defense set up was, that the renting was for an unlawful purpose. The court held that the knowledge of the agent was not to be imputed in this case to the principal, and that the plaintiff was entitled to disown the agent's contract and to recover on a *quantum valebat* for the use of the premises. The general rule is well established, that knowledge of the agent is knowledge of the principal, and that the principal must be charged with a notice of such facts as are communicated with the agent in the particular employment which has been committed to him. Cornfoot v. Fowke, 6 M. & W. 358; Cooper v. Slade, 6 H. of L. Cas. 793. And in Dresser v.

Norwood, 10 Jur. (N. S.) it is held that the principal is affected by the knowledge of his agent acquired in transactions other than those belonging to his agency. See also Hern v. Nichols, 1 Salk. 889, where a merchant employed a factor to sell silk for him, and the factor sold one sort of silk for another, and the doubt was whether this deceit could charge the merchant; HOLT, C. J., was of the opinion "that the merchant was answerable for the deceit of his factor, though not *criminaliter* yet *civiliter*, for seeing that somebody must lose by this deceit, it is more reasonable that he who employs the deceiver should be a loser than a stranger." But in every case where the doctrine of constructive notice is maintained, the knowledge of the agent has been imputed to the principal for the benefit of a third party, who has dealt with the agent in good faith. The court, in the case at bar, says that it can have no application here. "The plaintiff would not be responsible to the public by way of indictment, without showing an actual knowledge of the intended wrongful use of his premises, and, surely, the law will not impute turpitude to him, by charging him with a knowledge which he did not actually have, for the benefit

A lessor's knowledge at the execution of the lease that premises demised will be used in violation of a statute which declares that all buildings, etc., used as houses of ill fame, etc., are common nuisances, makes the lease of premises used for such purpose void, and gives the owner the right of re-entry, does not make the lease void so as to discharge the lessee from his covenants where the lessor neither shares nor furthers the lessee's illegal acts.¹

An assignment of a lease by the lessee does not discharge either the lessee or his surety from the covenants. It does not have this effect even when the lessor recognizes the assignment by accepting rent from the assignee.²

SEC. 223. License.—Distinction between, and a lease.—An instrument cannot operate as a lease, although words of demise are used therein, if it is evident that such was not the intention.³ Thus, a lease for years or for any specific term is a contract for the *exclusive* possession of lands or tenements; consequently, an instrument *that merely gives to another the right to use premises for a specific purpose, the owner of the premises retaining the possession and control of the premises, confers no interest in the land and is not a lease, but a mere license,*⁴ and a similar right may be given to others if it does not interfere with the exercise

of a defendant who sets up his own execution of such criminal design in his defense. See, also, on the general subject, *Hill v. North*, 84 Vt. 604; *Lawrence v. Tucker*, 7 Me. 795; *Bracken v. Miller*, 4 W. & S. (Penn.) 102.

¹ *Way v. Reed*, 6 Allen (Mass.) 364; *Trask v. Wheeler*, 7 id. 109; *Coleman v. Hall*, 9 id. 335; *Kreis v. Seligman*, 8 Barb. (N. Y.) 439; *Darter v. Earl*, 3 Gray, 482; *Ralston v. Boady*, 20 Ga. 449; *Sortwell v. Gughes*, 1 Curtis (U. S.) 244; *Hill v. Spear*, 50 N. H. 253; *Gaylord v. Sorogen*, 32 Vt. 110; *Aiken v. Blaisdell*, 41 id. 655; *Green v. Collins*, 3 Cliff. (U. S. C. C.) 494.

² *Way v. Reed*, 6 Allen (Mass.) 364; *Hunt v. Gardner*, 39 N. J. Law, 530; *Damb v. Hoffman*, 3 E. D. S. (N. Y.) 361. *Almy v. Grene* 18 R. I.

³ *Taylor v. Caldwell*, 3 B. & S. 826.

⁴ *Reg v. Morris*, 32 L. J. M. C. 245.

⁵ *Taylor v. Caldwell*, ante; *Williams v. Jones*, 3 H. & C. 256; *Hill v. Tupper*, 2 id. 121; *Funk v. Holdman*, 53 Penn. St. 229; *Stockbridge Iron Works v. Hudson Iron Co.*, 107 Mass. 290; *Cornish v. Stubbs*, 39 L. J. C. P. 206; *Coleman v. Foster*, 1 H. & N. 37. An instrument conferring an authority to do an act upon the premises of another, the owner still retaining possession, is a mere license and is limited to the person to whom it is given, and cannot be granted, assigned or transferred to another, *Carter v. Harlan*, 6 Md. 29; *Prince v. Case*, 10 Conn. 875; *Cook v. Stearns*, 11 Mass. 513; *Seidensparger v. Spear*, 17 Me. 123; *Simpkins v. Rogers*, 15 Ill. 397; *Frost v. R. R. Co.*, 23 Conn. 875, and is only binding as to third persons when it has been so far executed

of the right conferred upon the licensee.¹ Where, however, an interest in the land is given, *or where the license is for a definite period*, it amounts to a lease, if conferred in such a manner as to give it validity.²

Where a hall was agreed to be let for four nights at a £100 a day for the purpose of giving four concerts and day and night fetes; but from the agreement it was evident that the lessor was not to part with the possession of the premises during the four days, it was held not to amount to a demise.³ So where A paid B twelve shillings a week for permission to put his loom machines in a room in B's factory, and for ingress and egress to and from the room for himself and workmen for the purpose of work-

as to give rise to an equity, of which they had notice at the time of acquiring the interest sought to be charged with the license. *Wilson v. Chalfoot*, 15 Ohio 247; *Rennick v. Kearn*, 14 S. & R. (Penn.) 267; *Ricker v. Kelly*, 1 Me. 117.

¹In *Silsby v. Trotter*, 29 N. J. Eq. 228, it was held that a contract simply giving the right to take ore from a mine, no interest or estate being granted, merely confers a license under which the licensee acquires no right to the ore until he separates it from the freehold, and that *unless especially expressed* it is not exclusive. The authorities are agreed that a license to dig and take ore is never exclusive of the licensor *unless expressed in such words as to show that that was the intention of the parties*. When the licensee has simply the right to dig and take ore, the same right may be given to other persons. This has been the prevailing rule since *Mountjoy's Case*, And. 307, decided during the reign of Queen Elizabeth, Co. Litt. 164. In that case such a license was held to be like a grant of common *sans nombre*, which never excludes the grantor from enjoying the common with his grantees. In *Chetham v. Williamson*, 4 East, 469, LORD ELLENBOROUGH declared, "a liberty reserved of digging coals could not give the person reserving it the exclusive right to them. No case can be named where one who has only a liberty of digging for coals in another's soil

has an exclusive right to the coals, so as to enable him to maintain trover against the owner of the estate for coals raised by him." And in *Grubb v. Bayard*, 2 Wall. Jr. (U. S.) 81, where the license gave the licensee the right to dig, and carry away *all the iron ore to be found* in certain designated lands, it was held there was no grant of the ore, but the licensee *merely had the right to take away so much as he might dig*. The word "all" was held to show merely the extent of his license as to quantity; he was at liberty to dig all the ore there was in the land, *but he acquired no title to any until he separated it from the freehold*. His license conferred a right without stint as to quantity, but, like a grant of a right *sans nombre*, it did not exclude the grantor. A similar doctrine was expressed in *Funk v. Haldeman*, 53 Penn. St. 229, and in *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290, also in *Carr v. Benson*, L. R., 8 Ch. App. 524, where it is said: "It has been held, from the earliest period that a man taking a license where he is under no obligation to work, cannot exclude his licensor from granting as many more licenses as he thinks fit; provided, always, that they are not so granted as to defeat the known objects of the first licensee in applying for his license."

²*Hull v. Seabright*, 1 Mod. 42.

³*Taylor v. Caldwell*, 3 B. & S. 826.

ing and inspecting the machines, and for the steam power to run them, which was furnished by B; it was held that there was no demise to A of any of the room, and that the relation of landlord and tenant was not thereby created.¹ So it has been held that a grant by a riparian proprietor to a person, of a right to take water from a natural stream on which his land abuts, is a mere license in gross, and that the licensee has no such interest as will enable him to maintain an action against a wrongdoer.² But while this is true of a license that does not confer an interest in the land, yet, when the license *is coupled with an interest*, so that it is assignable, the rule is otherwise,³ and such an interest cannot be conferred by parol;⁴ but in some cases

¹ *Handcock v. Austin*, 14 C. B. N. S. 429.

² *Stockport Water Works v. Potter*, 8 H. & C. 800. See also *Hill v. Tupper*, 2 id. 121, where it was held that the grant by deed by a canal company to a person, of the *exclusive* right to put pleasure boats on their canal, for hire, did not convey such an interest as would enable him to maintain an action against a stranger who disturbed his right by putting and using other pleasure boats on the canal for hire. In *Bird v. Great Eastern R. R. Co.*, 19 C. B. N. S. 268, it was held that a license to hunt and shoot did not confer an interest in the land, and that an action would not lie in his name against a stranger who interfered with his right.

³ *Goff v. Obertuffer*, 3 Phila. (Penn.) 71. A license *not* coupled with an interest, is a mere personal privilege, and not assignable, *Dork v. Johnston*, 55 Penn. St. 162, and does not pass to a lessee of the licensee, *Groendyke v. Cramer*, 2 Ind. 382; and licenses are revocable at the pleasure of the licensor, *Hetfield v. Central R. Co.*, 20 N. J. L. 571; *Dinsmore v. Rich*, 22 Wis.; *Hitchens v. Shaller*, 32 Mich. 496; *Veghte v. Raritan Canal Co.*, 19 N. J. Eq. 153; *Wolfe v. Frost*, 4 Sandf. Ch. (N. Y.) 72; *Foster v. Browning*, 4 R. I. 47; *Kimball v. Yales*, 14 Ill. 464, and being unassignable is revoked by an *attempt* on the part of the licensee to assign it, *Dork v. John-*

son, ante, or by the death of the licensor or licensee, or by a conveyance of the estate by the licensor, unless it is irrevocable. *Coleman v. Foster*, 1 H. & C. 37; *Eggleston v. R. R. Co.*, 35 Barb. (N. Y.) 162; *Roberts v. Row*, 8 H. & C. 162; *Carter v. Hanlon*, 6 Md. 20, and if a license to build a dam or erect other structures is given, which is not revocable so long as the structure remains, yet, if it is destroyed by flood or fire or other casualty, it is revocable. *Veghte v. Canal Co.*, ante. In *Carter v. Page*, 4 Ired. (N. C.) 424, A & B, owning adjoining lands, agreed that B might cut ditches on A's land, which were useful both to A and B, and that they should be dug under the direction of A and until he was satisfied, and the ditches were accordingly so dug by B, and used and enjoyed by him during A's lifetime, and for three years afterwards, without complaint. It was held, that although the license to use the ditches on A's land *expired on A's death*, and the person succeeding to his title might fill up these ditches, if he thought proper to do so, yet he could not sue B for a nuisance, especially without a reasonable notice to discontinue the use of the ditches. But if a license is given to two persons, and one of them dies, it is not thereby revoked as to the other, *Chandler v. Spear*, 22 Vt. 338.

⁴ *Collins Co. v. Marcy*, 25 Conn. 239, and where it is attempted, it is void, and revocable at any time,

a parol license may become operative by way of estoppel so as to become irrevocable when the licensee has made large expenditures upon the faith of it, with the knowledge and tacit assent of the licensor.¹ In those cases where assent has been given to one by another to do a certain act upon his land, the natural and probable consequences of which are to produce a certain result, and the person to whom assent is given goes on and expends money on the strength of the assent and makes erections of a permanent character; while the assent does not give any interest in the land, and *at law* is revocable at any time, even though given for a consideration,² yet, a court of equity, in a proper case, will enforce it as an agreement to give the right, and particularly where its revocation would operate as a fraud upon the licensee, or would be productive of great hardship, will restrain its revocation.³ But even at law, a license is a full defence for all acts done under it, *within the scope of the license* before its revocation, but not after.⁴ But the license must not be exceeded, and in order to operate as

Tanner v. Valentine, 75 Ill. 624; Brown v. Woodworth, 5 Barb. (N. Y.) 550; Selden v. Delaware, &c., Canal Co., 29 N. Y. 684; Stevens v. Stevens, 11 Met. (Mass.) 201.

¹ Lane v. Miller, 27 Ind. 584. In Hodgson v. Jeffries, 52 Ind. 894, a license by the owner of land to the owner of adjoining lands to construct and use perpetually a ditch over the land of the former, for the purpose of draining the land of the latter, may be verbal, and upon such construction and continued use, is irrevocable by the grantee of the former, though unforeseen injuries result to the former and his grantee from the construction and use of such drain. In Wilson v. Chalfant, 15 Ohio, 248, it was held that one who enters under a parol license, and erects a fixture, may maintain trespass against the owner of the land if he interferes with it; but, where the license is such as conveys an interest in land, as to allow the drippings from the eaves of an adjoining building to fall upon the land, it is void, if by parol, and

consequently is revocable at any time. Tanner v. Valentine, 75 Ill. 624.

² Huff v. McCauley, 58 Penn. St. 206; Houston v. Laffee, 46 N. H. 505; Hetfield v. R. R. Co., 29 N. J. L. 571.

³ Veghte v. The Raritan, &c., Co., 19 N. J. Eq. 143; Brown v. Bowen, 30 N. Y. 548; Wood on Nuisances, 847.

⁴ Wolfe v. Frost, 4 Sandf. (N. Y.) Ch. 72; R. R. Co. v. McLaughlin, 59 Penn. St. 28; Cook v. Prigdon, 45 Ga. 331; Houston v. Laffee, 46 N. H. 508; Bridges v. Purcell, 1 Dev. & B. (N. C.) 462; Mumford v. Whitney, 15 Wend. (N. Y.) 379. As to the effect of a license from one to do an act upon the land of another, at law the case of Hetfield v. The Central R. R. Co., 29 N. J. L. 571, is in point. In that case the charter of the defendant authorized them to enter upon and take the lands required for their road, but directed that they should not enter without the consent of the owner. The defendant entered upon the plaintiff's lands by his

a defence at law for an act done in pursuance of it, it

consent, but did not take any conveyance from him in the manner required by law, in order to give them right or title. The court held that this consent did not dispense with the necessity of a deed or conveyance of the land or right, in the form required by law. That it was not a consent that was intended to confer a title, and was revocable. In *Wood v. Leadbitter*, 13 M. & W. 887, the question as to the effect of a license arose in an action of assault and battery. The evidence disclosed that the plaintiff purchased a ticket for the sum of one guinea, which entitled him to admission to the grand stand. That the Earl of Ellington was one of the stewards of the races, and that the tickets were issued by the stewards, but were not signed by Lord Ellington. That under this ticket the plaintiff entered the ground on one of the race days, when the defendant, who was a policeman, under the directions of Lord Ellington, who first ordered him to leave, upon his refusing to do so committed the assault complained of, using no more force than was necessary for that purpose. Upon the trial the judge directed the jury that, assuming the ticket to have been sold to the plaintiff under the sanction of Lord Ellington, it still was lawful for Lord Ellington, without returning the guinea, to order the plaintiff to quit the inclosure, and that after a reasonable time had elapsed, if he failed to leave, then the plaintiff was not on the ground by the leave and license of Lord Ellington, and the defendant would be justified in removing him under his orders, and this ruling was sustained in *Exchequer*. In *Miller v. The Auburn, &c., R. R. Co.*, 6 Hill (N. Y.) 61, which was a case somewhat similar to that of *Hetfield v. The Central R. R. Co.*, before referred to, the defendants erected their railroad with an embankment upon Garden street in Auburn, interrupting the plaintiff's access to his premises, in 1839 and maintaining it until 1842, when this suit was brought. The defendants offered to prove that the embankment was raised under a

parol license from the plaintiff, but the proof was excluded by the court, and the case was heard in the Supreme Court upon the question of the admissibility of that evidence. COWEN, J., among other things, said; "If what the defendants in this case proposed to show was true, viz., that the plaintiff verbally authorized the making of the railway, while the authority remained, their acts were not wrongful. License is defined to be a power or authority. So long as the license was not countermanded, the defendants were acting in the plaintiff's own right." In this case the court upheld a license as a defence until it is revoked, and hold that it must be revoked before an action can be brought; but in *Veghte v. The Raritan Power Co.*, ante, the court held that the bringing of the action is a revocation of itself and all that is necessary. But the former would seem to be the better rule, and the one generally adopted. The following authorities will be found applicable upon the question of the effect of a license: *Ex parte Coburn*, 1 Cow. (N. Y.) 570; *Cook v. Stearns*, 11 Mass. 533; *Ruggles v. Lesure*, 24 Pick. (Mass.) 190; *Prince v. Case*, 10 Conn. 375; *Rex v. Herndon-on-the-hill*, 4 M. & S. 565; *Fentiman v. Smith*, 4 East, 107; *Hewlins v. Shipman*, 5 B. & C. 222; *Bryan v. Whistler*, 8 id. 288; *Cacker v. Cowper*, 1 C. M. & R. 418; *Wallis v. Harrison*, 4 M. & W. 538. It has been held in some of the cases that the effect of a license executed, as, for instance, to enter upon land to erect a house or dam, and followed by user, is to give the licensee a right to personal property upon the land of the grantor, and although revocable at will, yet the licensee can enter for its removal, although not to maintain or use the property there. That the license is irrevocable as to the right to remove the property. *Barnes v. Barnes*, 6 Vt. 388; *Prince v. Case*, ante; *Van Ness v. Packard*, 2 Pet. (U. S.) 143; *Cary v. Ins. Co.* 10 Pick. (Mass.) 540; *Marcy v. Darling*, 8 id. 283. There are a class of cases, however, particularly in Pennsylvania,

must be shown that it covers the very act, for the recovery of damages for the doing of which action is brought, and if the license does not embrace the act to the full extent, liability will attach for all such excess. Thus, if an action is brought for an injury resulting from the flooding of land by a dam erected by the defendant, it is not enough to show that the plaintiff assented to or licensed the erection of the dam, *unless it appears that he could then have known or reasonably foreseen that his land would be injured by the dam in the manner complained of.*¹ If the dam itself is so erected as to produce damage to the lands of supra-riparian owners, it is a nuisance, and parties injured thereby are not estopped from a recovery for injuries therefor upon the ground of acquiescence in its construction, *unless it could reasonably have been ascertained or foreseen at the time of its erection that it would produce the ill-results complained of.* In this respect it stands precisely upon the same ground as any other nuisance, and the rule in reference to acquiescence therein, and estoppel by reason of acquiescence,

where it is held that where acts have been done, in pursuance of a license and relying upon it, the license operates as an equitable estoppel, and the licensor will be estopped from revoking it to the injury of the licensee, so long as the license is not exceeded. But that for all excess of use an action may be maintained. *Bridge Co. v. Bragg*, 11 N. H. 102; *Lefevre v. Lefevre*, 4 S. & R. (Penn.) 241; *Ricker v. Kelly*, 1 Greenl. (Me.) 117; *Hepburn v. McDowell*, 17 S. & R. (Penn.) 383; *Cook v. Prigdon*, 45 Ga. 331; 13 Am. R. 582; *Houston v. Laffee*, 46 N. H. 608. In *Selden v. Del. & Hud. Canal Co.*, 29 N. Y. 634, where defendants entered upon the lands of plaintiff by parol license from him and enlarged the same, it was held that the license operated as a defence to all that had been done under it, but would not justify a maintenance of the same after the license is revoked. The same was also held in *Mumford v. Whitney*, 15 Wend. (N. Y.) 380; *Foot v. N. H. & C. Co.*, 23 Conn. 214; *Eggleston v. N. Y. & H. R. R. Co.*, 35 Barb. (N. Y.

Sup. Ct.) 162. In *Woodard v. Seeley*, 11 Ill. 157, it was held that a license by deed or parol is always revocable, unless coupled with an interest and executed, and that then it is irrevocable. In *Kimball v. Yates*, 14 Ill. 464, it was held that a parol license to cross a man's farm is revocable at any time at the will of the licensor. See also *Roberts v. Rose*, L. R., 1 Exchq. 82.

¹ *Bell v. Elliott*, 5 Blackf. (Ind.) 118. In any event if a license is given under a misapprehension of the effects of its exercise, it may at once be revoked. *Brown v. Bowen*, 30 N. Y. 519; *Smith v. Scott*, 1 Kerr. (N. B.) 1; *Allen v. Fiske*, 42 Vt. 462; *Eaton v. Winne*, 20 Mich. 156; *Hamilton v. Wudolf*, 36 Md. 301; *Dempsey v. Kipp*, 62 Barb. (N. Y.) 311; *Eustis v. Chiner*, 56 Me. 407; *Freeman v. Hadley*, 33 N. J. L. 523; *Giles v. Simonds*, 15 Gray (Mass.) 401; *Moye v. Tappan*, 23 Cal. 306; *Drake v. Wells*, 11 Allen (Mass.) 141; *Miller v. State*, 39 Ind. 267; *Druse v. Wheeler*, 23 Mich. 439; *Dodge v. McClintock*, 47 N. H. 383.

is that, where a person acquiesces in the erection or maintenance of anything that is a nuisance *per se*, or that he might reasonably have foreseen would become a nuisance, a court of equity will not interfere by injunction to relieve him from the effects thereof, but his remedy at law remains unless he has bound himself by grant or license sufficient in law to bar an action, or unless the party maintaining the nuisance has acquired a prescriptive right to maintain it. *The law presumes that when a man assents to the doing of an act, he only assents to its being so done as not to injure him.*¹ But, while a license must not be exceeded, yet it carries with it all the incidents necessary to its exercise.² Thus, a license to take

¹ *Burkhardt v. Houghton*, 27 Beav. 425, is a very full and acceptable authority upon this point, and, except that the case is a very long one, it would be given here. See also *McKnight v. Ratcliff*, 44 Penn. St. 159, where it was held that, though the plaintiffs, who were in the mining business, permitted the defendants in the same business to operate through their gangway, yet, that this permission would not justify the defendants in filling up the plaintiff's shaft with water.

² A license to enter upon premises may sometimes be implied, as, when the owner or occupant of the premises has taken and keeps the property of another there; there is an implied license to the owner of the property to enter and take it, *Williams v. Morris*, 8 M. & W. 488; *Patrick v. Colerick*, 8 id. 435; *Anthony v. Haney*, 8 Bing. 186, and it is apprehended that this rule prevails, wherever the property of one is upon the premises of another *without the fault* of the owner of the property, and under such circumstances that the owner of the premises has no claim or lien thereon, legal or equitable, the owner may, if he can do so peaceably, doing as little damage as possible, enter and take it away, *Stirling v. Warden*, 51 N. H. 217. In the case of *Richardson v. Anthony*, 13 Vt. 278, the defendant's cattle were found by him upon the plaintiff's land. How they came there was not

shown, but it was admitted they had been in the plaintiff's possession a year, and the plaintiff forbade the defendant to enter his land to take them away. The defendant against the protest of the plaintiff, entered upon the land and drove them away, the plaintiff offering no physical resistance. The court held that the defendant was justified in his entry for that purpose, and that an action of trespass would not lie against him therefor. *Williams, J.*, in delivering the opinion of the court said: "The time during which the cattle remained in the plaintiff's possession is of no importance. The manner in which they came there would be. The right of the owner of personal property to enter on the premises of another to reclaim property, may depend upon the manner in which possession was obtained. *It appears to be well established that if one man takes the goods of another and puts them on his own land*, the owner may enter and take them. * * * In the absence of any evidence as to how the heifers in question came into the enclosure of the plaintiff, when it may be as well presumed that they came there *with* his consent and without any neglect on the part of the defendant, as the contrary, and when the evidence discloses that he detained them under a wrongful claim, *we consider that the defendant was justified in entering the enclosure to take his*

stone from the licensor's land, carries with it the right to

own property." BENNETT, J., dissented from the opinion of the court but his dissent was predicated upon the ground that the cattle had remained so long in the plaintiff's possession as to invest him with a *quasi* property therein, of which he could not be divested in such a summary manner. But the opinion of the court has many authorities in its support, and is predicated upon principles of natural justice. In *Allen v. Feland*, 10 B. Mon. (Ky.) 806, it was held that where one has property upon the premises of another, he may, if he can do so peaceably, enter and take it. In *Stirling v. Warden*, 51 N. H. 217, 12 Am. Rep. 80, the plaintiff had formerly been postmaster, and used a part of his house for a post-office. Another person having been appointed postmaster, the defendant by such new appointee was appointed deputy postmaster, and was directed by him to go to the plaintiff's house and bring away the property there belonging to the government. The plaintiff resisted the taking of the property, and the defendant reasonably repelled his assault and took away the property. The court held that an action of trespass would not lie therefor. But see *Hupport v. Morrison*, 27 Miss. 865, where it was held that unless property belonging to one is in the wrongful possession of another, he will not be justified in going upon his premises to take it away, unless he can do so peaceably, and will not be justified even in repelling an assault made upon him by the owner of the estate unless it is excessive. In *Gardner v. Rowland*, 2 Ired. (N. C.) 247, a similar doctrine was held, except that in that case the defendant was held liable because he let down the fence to drive his hogs out of the plaintiff's premises, instead of driving them through the gap in the fence through which they entered, or, to use the language of the court, "because he let down the fence, instead of driving them through a gap or gate when there is one." In *Adams v. McKinney*, Addis. 258, it was held that if J S, who ought to keep up a fence between a close of his and a close of

J N, suffer the same to be out of repair, and the beast of J N go through the fence into the close of J S, trespass does not lie, and J S may pursue his cattle and drive them back on to his own close, because the damage happens from the fault of J N. In *Merrill v. Goodwin*, 1 Root (Conn.) 209, the defendant entered upon the plaintiff's premises and cut a tree in which he found a swarm of bees. It did not appear that the bees escaped from his hive, and the court held him a trespasser; but the court plainly intimated that, if the bees had escaped from the defendant's hive, he would have been justified in doing all that was necessary to reclaim his bees. But, while bees so escaping from a hive may be reclaimed by the owner, if they can be identified, yet the owner of the bees cannot enter upon the premises of another and cut the tree in which they are, without subjecting himself to an action of trespass, and liability to the extent of the actual damage to the soil and tree. But if a third person cuts the tree, the owner of the bees may maintain trespass therefor. *Goff v. Kilts*, 15 Wend. (N. Y.) 550. If they can be reclaimed without doing *actual* injury, as if they are on the fence or on a bush, *quare?* In *Barnes v. Barnes*, 6 Vt. 888, the defendant erected a house upon premises owned by the plaintiff under a license. This license was subsequently revoked, and the defendant, within a reasonable time after the revocation of the license, entered upon the premises and took down the house and removed the materials. The court held that the defendant was not liable in trespass therefor. But in such cases, where an erection is made under a license, the licensee must remove the house within a reasonable time after the license is revoked. In *Prince v. Case*, 10 Conn. 375, it appeared that the owner of land gave to a person a license to erect a dwelling-house upon his land, for his own use. The licensee subsequently conveyed the house to the plaintiff in error. After the death of the licensee, the grantor of the licensor brought

enter with teams to draw them away, the right to be ex-

ejection against the grantee of the licensee, and recovered therein. After the lapse of more than a year after his recovery and possession in the action of ejectment, the grantor of the licensor took down the house, but did not remove the materials. In an action of trespass for taking down the house, it was held that norecovery could be had, as the owner of the house had had a reasonable time in which to remove it, and having failed to do so, the defendant was justified in taking it down. *Parker v. Redfield*, 10 Conn. 497; *Baldwin v. Breed*, 16 id. 68; *Branch v. Doane*, 17 id. 409; *Curtis v. Hoyt*, 19 id. 166. Such a license is personal, and ceases when the house is conveyed. *Hull v. Babcock*, 4 Johns. (N. Y.) 418; *The King v. Newton*, *Bridg.* 115; *Honees v. Hall*, 7 B. & S. 481. A house erected under a license is personal property, and remains the property of him who places it upon the land. *Ricker v. Kelley*, 1 Greenl. (Me.) 117; *Welles v. Bannister*, 4 Mass. 514; *Curry v. Com. Ins. Co.*, 10 Pick. (Mass.) 540; *Money v. Darling*, 8 id. 283; *Ashman v. Williams*, 8 Pick. (Mass.) 402. In *Webb v. Paternoster*, *Palm.* 71, a license to place a stack of hay upon another's land was held not to be countermandable until after a reasonable time had elapsed. See *White v. Elwell*, 48 Me. 360. In *Winter v. Brockwell*, 8 East, 308, a license to erect a skylight was held not revocable after the skylight was erected, without placing the licensee *in statu quo*. See *Wood v. Lake*, *Sayer*, 3; *Liggins v. Inge*, 7 Bing. 682. But if a person wrongfully places his property upon the premises of another, he has no right to enter to remove it. Thus in *Newbald v. Sadler*, 9 Barb. (N. Y.) 57, the defendant's servant drove his team upon the plaintiff's premises, and upon his return found the fence put up, and the plaintiff forbade him from taking it down. The servant went and informed the defendant, and he entered the plaintiff's premises, and against the protests and actual resistance of the plaintiff, removed his team, assaulting the plaintiff

in order to accomplish his purpose. In an action of assault and battery therefor, the defendant justified upon the ground that he entered the plaintiff's premises to remove his property, &c., and that he used no more force than was necessary to accomplish his purpose. The court held that he was not justified in making the assault, or even in the removal of his property under the circumstances disclosed by the pleadings and evidence. But in *Robson v. Jones*, 2 Bailey (S. C.) 4, it was held that where one has peaceably entered the premises of another, an action of trespass will not lie against him for forcing his way out by breaking a gate which has been closed and locked by the owner of the land, with a view to detaining the property of the person entering. But this must be understood as applying only to an entry made upon lands of another under a license, express or implied. If the original entry was unlawful, the breaking out would be unlawful, and liability would attach for all damages that resulted from the trespass. The mere fact that an entry is peaceable, does not render it lawful, if it was made without authority, express or implied, or without a justifiable cause. See also *Bro. Tresp.* pl. 186, and *White v. Wiltshire*, *Cro. Jac.* 555. The mere fact that a person's property is upon the premises of another, does not render an entry to take it away lawful. If the property is there by his own wrong, or if the title thereto is in dispute, or if he cannot take it away peaceably, he must resort to his remedy at law to recover it. *Roach v. Damson*, 2 *Humph.* (Tenn.) 425; *Chase v. Jefferson*, 1 *Houst.* (Del.) 257. In *Blake v. Jerome*, 14 Johns. (N. Y.) 406, the defendant entered the plaintiff's close against the will of the plaintiff, and took therefrom a mare and colt, which he claimed as his property, and to which the plaintiff also claimed title. The court held that under the circumstances of the case, the defendant was a trespasser. In *Hernance v. Vernay*, 6 Johns. (N. Y.) 4, the defendant sold certain premises, reserving by parol a certain bark-

exercised carefully.¹ And a license to take wood from cer-

mill standing upon the premises. He entered the premises after the sale and removed the bark-mill. Without deciding the question as to whether the bark-mill was in point of fact a fixture, the court held that, under the circumstances, he was a trespasser, and liable for a wrongful entry. In *Holmes v. Tremper*, 20 Johns. (N. Y.) 29, the defendant had been a tenant of certain premises of the plaintiff on which he had erected a cider-mill and press. After the tenancy had expired, and after his removal from the premises, he entered and took away the cider-mill and press. The court held him a trespasser upon the ground that the property should have been removed during his tenancy, and having been left there by his own wrong, he was not justified in entering to take it away. In *Chambers v. Bedell*, 2 W. & S. (Penn.) 225, the court expressly held that where the goods of another had been wrongfully taken from him and placed upon the premises of the taker, the owner of the goods might enter upon the premises of the taker and remove it, without being liable even to nominal damages therefor. This case follows the doctrine of *Chapman v. Thumblethorp*, Cro. Eliz. 829, in which it was held that if J S drives the beast of J N into the close of J S, or if it have been driven therein by a stranger with the consent of J S (and this consent may be implied—see *Richardson v. Anthony*, 12 Vt. 273), J N may lawfully go thereinto to take it away, because J S was himself the first wrong-doer. *Patrick v. Colerick*, 3 M. & W. 484; *Rhea v. Sheward*, 2 id. 424; *Spencer v. McGowen*, 18 Wend. (N. Y.) 256. So, if the goods of one have been stolen and put upon the premises of another, the owner may lawfully enter to take them away. *Higgins v. Andrews*, 2 Rolle's Rep. 55. So, if a person has fraudulently obtained the property of another, the owner may enter upon the premises of the person who has it in his possession, if

he can do so peaceably, to take it away. As if A by means of fraud obtains a horse from B, B upon discovery of the fraud may go upon A's land to take the horse away, if he can do so without a breach of the peace. *Wheelden v. Lowell*, 50 Me. 508; *Spencer v. McGowen*, 18 Wend. (N. Y.) 257. So, if a man who is assaulted by another, and in danger of his life, enters the premises of another, trespass will not lie, "because the doing of this—it being necessary for the preservation of his life—is lawful." 87 H. 6, 37 pl. 26. So if "A enters the premises of B to succor the beast of B, which is in danger, an action does not lie, because, as the loss to B if his beast had died would be irremediable, the doing of this is lawful. But if A go into the close of B to prevent the beast of B from being stolen, or to prevent his corn from being consumed by hogs, an action *would* lie, for the loss, if either of these things had happened, would not have been irremediable." Bro. Tresp. pl. 215. So, too, if a tree belonging to A is *blown* down, and falls upon the land of B, A may lawfully go upon the land of B to remove it, for the tree did not fall there by any fault of A; Bro. Tresp. pl. 215; but if A *cuts* a tree upon his land, and it falls upon the land of B, this is a trespass of itself, and he may not lawfully enter to remove it, for the tree is there by his fault, and might have been avoided. Id. In *Millin v. Fawdry*, Latch. 120, it was held that if the fruit of a tree standing upon the land of a person, falls upon the land of another, the owner of the tree may lawfully enter to get the fruit, because the falling of the fruit there was not by the fault of the owner of the tree. So, in *Toplady v. Sealey*, 2 Roll. Abr. 568, it was held that where one is looking for cattle which he has lost, he may lawfully go upon a footpath over the lands of another, but if he goes outside the path, trespass lies. See Bac. Abr. Trespass F. In Mil-

¹ *Clark v. Vt. Central R. R. Co.*, 28 Vt. 108.

tain premises carries with it the right to enter to cut and draw it away ;' and a license to cultivate lands carries with it as an incident the right to enter and remove it.' But a parol license to take wood may at any time

lin v. Fawdry, Latch. 120, it was held not to be trespass for one to drive cattle belonging to another from his own lands upon the land of the owner of the cattle. So, too, in the same case it was held that trespass would not lie even if the cattle were chased out "with a little dog," and the dog, notwithstanding the master's endeavor, afterwards chases the beasts into the owner's enclosure, for the chasing of them out of the close was lawful, and it is not in his power to prevent them from being chased into the cattle-owner's enclosure. But otherwise if a stranger chases the cattle out, for, by doing this, although the owner of the land on which the cattle are trespassing is apparently benefited, yet by his act the owner is deprived of his right to distrain the beast. *Bro. Tresp.* pl. 421 ; *Kelw.* 48 B. ; *Bac. Abr. Trespass F.* In *Nettleton v. Sikes*, 8 Metc. (Mass.) 84, the defendant cut down and peeled trees upon the plaintiff's land, under a valid agreement that he should have the bark for his services. He entered upon the plaintiff's premises and removed the bark. The plaintiff brought an action of trespass against him therefor, but the court held that the action would not lie, as the bark at once, upon being taken from the trees, became the property of the defendant, and that he might lawfully enter to take it away ; and the doctrine of this case has been reaffirmed by the courts of that State in several later cases. *McNeal v. Emerson*, 15 Gray (Mass.) 384 ; *Drake v. Wells*, 11 Allen (Mass.) 141 ; *McLeod v. Jones*, 105 Mass. 408. But the doctrine of these cases rests upon the ground that, where there is an absolute sale of property which is lying upon the vendor's land, there is an implied license to enter and take it away, and in the case of *McLeod v. Jones*, ante, where the defendant was the mortgagee of chattels in the possession of the

plaintiff, it was held that no such license could be implied when the goods were locked up in the mortgagor's house, and an entry could not be had without breaking in. The rule in reference to the sale of the property lying or being upon the premises of another at the time of sale, would seem to be that, when there is an absolute sale of property which the purchaser is to remove, which at the time of sale is upon the premises of the vendor, there is an implied license to enter to remove the property. In any event, if the entry is made peaceably, and in doing so no special damage is done, no more than nominal damages could be recovered ; but I apprehend that not even nominal damages could be recovered under such a state of facts. These cases follow the doctrine laid down in *Rolle's Abr.* 567, M. pl. 1, where the author concisely expresses the rule thus : "If J S has sold trees growing upon his land to J N, and J N goes upon the land to cut and take them away, the action of trespass does not lie ; the right of doing this being incident to the purchase ;" and in *Bro. Tresp.* pl. 400, it is said that "if the land on which growing trees are sold be afterwards sold, and the person to whom they are sold go upon the land to cut and take them away, trespass does not lie." In 2 *Rolle's Abr.* 564, H. pl. 1, 2, the author says : "If a man who was seized in fee of land, after having felled trees thereupon, die, and his executor goes upon the land within a reasonable time after his death to take them away, an action does not lie, because the law gives an executor a reasonable time to possess himself of the goods of his testator." See also *Dermott v. Grover*, Willes, 195.

¹ *Driscoll v. Marshall*, 15 Gray (Mass.) 62.

² *Com. v. Ritney*, 4 Allen (Mass.) 316 ; and the licensee is entitled to a reasonable time to take away

be revoked, except as to that cut at the time of revocation, and an entry after that, except to take away the wood so cut, will amount to a trespass.¹ A license to "inhabit or enjoy" certain premises, when the right is exclusive, amounts to a lease, and should be plead as such.² But this is not so where the license does not amount to an exclusive right, as, a license to sow,³ to stack hay,⁴ or to hunt upon lands.⁵ A party who seeks to justify under a license, must plead it specially, as it cannot be given in defence under the general issue;⁶ and unless plead, only goes in mitigation.⁷ Proof of a *lease* will not support a plea of license.⁸ A license, in order to be efficacious, must be granted by a person having authority to do so, *as it can never extend beyond the interest which the licensor has;*⁹ consequently, a person entrusted with the care of an estate, or an agent with authority to lease it, cannot grant a license. There must be express authority, or the license is invalid.¹⁰

SEC. 224. *Leases in reversion.—Interesse termini.*—All leases made to commence at a future day are leases in reversion. In other words, all leases that do not confer a present right of enjoyment, and are not perfect in estate, may be said to be leases in reversion.¹¹ Strictly and technically speaking, the term signifies a lease to commence after the termination of another estate or in-

the wood already cut. *Prince v. Case*, Ante; *Cornish v. Stubbs*, 39 L. J. C. P. 206.

¹ *Giles v. Simonds*, 15 Gray (Mass.) 441.

² *Hall v. Seabright*, 1 Mod. 14; *Reg. v. Morrish*, 33 L. J. M. C. 245; *Anonymous*, 11 Mod. 42; *Trever v. Roberts*, Hard. 366; *Anonymous*, 3 Salk. 223; *Pritchard v. Dodd*, 5 B. & Ad. 689.

³ *Hare v. Celey*, Cro. Eliz. 148.

⁴ *Wood v. Lake*, Say, 8; *Webb v. Paternoster*, Palm. 771.

⁵ *Anonymous*, 3 Salk. 223.

⁶ *Finch v. Alston*, 2 S. & P. (Ala.) 88; *Stambaugh v. Hallabaugh*, 15 S. & R. (Penn.) 357.

⁷ *Hamilton v. Windolph*, 36 Md. 301.

⁸ *Johnson v. Carter*, 16 Mass. 441.

⁹ *Petty v. Evans*, 2 Brownl. 40; *Munifas v. Baker*, 1 Keb. 25; *Richardson v. Richardson*, 9 Gray (Mass.) 213.

¹⁰ *Gilbert on Tenure*, 333.

¹¹ *Winter v. Loveday*, Comyn, 89; *Goodtitle v. Funucan*, 2 Doug. 565. Although a verbal lease for the term of one year, to commence at a future day, is void under the Statute of Frauds, yet, if the tenant takes possession under the lease, and pays the rent as stipulated, this imparts validity to the contract, creates the relation of landlord and tenant between the parties and gives the landlord a right to an attachment against the crop for advances made during the year. *Martin v. Blanchett* Ala. 288.

terest in the same lands, then in being ;¹ therefore, it may be said, that a future lease and a lease in reversion are synonymous.² Under such leases, the lessee acquires a mere *interesse termini*, until the arrival of the period when, in point of time, his estate is to commence.³ This *interesse termini*, under our statutes of enrollment, which have done away with the feudal method of livery of seizen, enables him, without entry, to enforce his claim to the estate by any proper action against either the lessor or any other person.⁴ At the common law, an estate of freehold cannot be made to commence *in futuro* ; consequently a lease for life or for lives cannot be so made.⁵ "Yet" says MR. PLATT,⁶ "nothing can be clearer, than that a freehold interest may be made to commence *in futuro* under the statute of uses."⁷ The lessor granting such a lease,—as in one case a lease for sixty-one years, to take effect after the termination of a lease for a similar term previously granted by him,—is not regarded as parting with his reversion so as to disentitle him to distrain for rent due under the prior lease,⁸ and, as a consequence, he does not part with his interest in the rents accruing under a prior lease.⁹ But where a person leases or conveys his reversionary interest in lands, he thereby confers upon the lessee a vested interest and a right to the rents accruing thereafter, under the prior lease. But, if the language is such as to confer only an *interesse termini* upon the lessee, the lessor's right to the rent still remains.¹⁰ If, in a lease to take effect after the termina-

¹ Winter v. Loveday, ante ; Allan v. Culvert, 2 East, 387.

² Sugden on Powers, 747.

³ Smith v. Day, 2 M. & W. 684 ; 2 Preston, Conv. 146.

⁴ Bryan v. Bradley, 16 Conn. 474.

⁵ Whitlock's Case, 8 Coke, 69 b ; Winter v. Loveday, ante.

⁶ 1 Platt on Leases, 448.

⁷ Statute 27 Hen. 8, Chap. 10. See also Bryan v. Bradley, ante.

⁸ "It appeared," said LORD ABINGER, C. B., in Smith v. Day, 2 M. & W. 700, "that during the continuance of a lease from Sir Thomas Wilson to certain parties,

he granted another to Sir H. Framlingham, to take effect from the expiration of the first : and it was contended that he had granted away the reversion immediately expectant on the first lease, and, therefore had not the power of making any distress for rent under it. This point was raised, but not very strongly pressed ; and the court expressed an opinion in the course of the argument, that there was no assignment of the reversion so as to prevent the power of distress."

⁹ 1 Platt on Leases, 444.

¹⁰ 1 Platt on Leases, 444.

tion of a future lease, the former lease is recited, and the second lease is made to commence *after such prior lease is terminated*, it will take effect immediately upon the termination of such former lease, whether by effluxion of time, forfeiture, or any cause, although by the habendum it is made to commence at the expiration of the former lease, for ten, twenty or forty years, as the case may be; but if the former lease is recited, yet, if the second lease is made to commence in so many years from its date, being the last day of the time named in the former lease, the second lease will not begin until the termination of the former lease by effluxion of time, although it is, in fact, previously terminated in interest.¹ If a lease is made by one for life, and he grants a lease for a term to begin after the death of the tenant for life, a reversionary interest by way of future lease is passed, although the word demise is not used.² A lease made to commence upon the happening of a certain contingency, attaches at once upon the happening of such contingency; and, if it is made to commence upon the happening of several contingencies, as, if several parcels of land are demised, and, by the lease, the term is to commence as to one parcel upon the happening of a certain event, and of another upon the happening of a certain, other event, &c., the respectively in the lease will take effect and commence in order in which the events occur, although the rent is fixed at a gross sum for the whole.³

SEC. 225. *Interesse termini*.—Before entry, a lessee for years has at common law only an *interesse termini* (an interest of a term), and no possession. He cannot maintain an action of trespass;⁴ but he may maintain ejectment,⁵ or he may assign his interest, and such assignee may enter, or maintain ejectment. If a lease is so framed as to be a bargain and sale under the statute of uses, the

¹ Woodhouse's Case, 1 Dyer, 93 b; Wrottsley v. Adams, 2 id. 177 b; Dove v. Willott, Cro. Eliz. 160.

² 4 Bacon's Abr. Tit. Leases (N.).

³ Veal v. Roberts, Cro. Eliz. 199.

⁴ Co. Litt. 296 b; Wheeler v. Montefiore, 2 Q. B. 128, 156;

Turner v. Cameron's Coalbrook Steam Coal Co., 5 Exchq. 932; Litchfield v. Ready, id. 939; Lowe v. Ross, id. 553; Harrison v. Blackburn, 17 C. B. N. S. 678.

⁵ Parsley v. Day, 2 Q. B. 156; Ryan v. Clark, 14 Q. B. 73.

possession is immediately executed in the lessee, without actual entry.' Premises were demised by parol for a year, the lessee accepted the lease, and by virtue of the demise entered upon the demised land : before and at the time of the demise, eight acres included in it had been demised to a third party, in whose possession they were, so that the lessee could not, and did not, enter upon them : it was held that the latter demise was wholly void as to the eight acres, and that the rent was not apportionable, and could not be distrained for, the impediment of the lessee taking possession not being analogous to an eviction by an elder title.' So where the tenant could not obtain possession of part of the premises demised, it was held an action of covenant could not be maintained by the lessor against the lessee for the rent, as in such an action it could not be apportioned.' A lessor may release the rent reserved before entry, in respect of the privity ; so the interest which the lessee has before entry is grantable to another ; and although the lessor dies before the lessee enters, yet the lessee may enter into the lands ; so if the lessee dies before he enters, yet his executors or administrators may enter, because he presently by the lease has an interest in him : so if it is made to two, and one dies before entry, his interest survives.' This *interesse termini* is in the lessee, whether the lease is made to commence immediately or at a future day.'

SEC. 226. Void or voidable.—When a lease contains a proviso or condition that on breach of any of the covenants, the lease "shall cease, determine and be utterly void, to all intents and purposes whatsoever," such words will be construed to mean *void at the election of the lessor*.' The lessee will not be allowed to take advantage of his own wrongful act or omission, and to say that thereby the lease has become void.' The lessor must do some act

¹² Blac. Com. 270.

¹³ Neale v. Mackenzie, 1 M. & W. 747.

¹⁴ Holgate v. Kay, 1 C. & K. 841.

¹⁵ Co. Litt. 46 b, 270 b.

¹⁶ Com. Dig. Tit. Estate (G) 14 ; Lock v. Furz, 19 C. B. N. S. 96.

¹⁷ Roberts v. Davey, 4 B. & Ad. 667 ; Pennington v. Cardale, 8 H. & N. 656 ; Hughes v. Palmer, 19 C. B. N. S. 393, 404 ; 1 Smith L. C. 19.

¹⁸ Rede v. Farr, 6 M. & S. 121 ; Bryan v. Bancks, 4 B. & Ald. 401 ;

evidencing his intention to enter for the forfeiture and determine the lease;' and the lease will be *avoided from that time only*; but previous arrears of rent may be sued for, although upon re-entry the lessor is to have the premises again "as if the said indenture had never been made."² So the lessor may sue for any previous breaches of covenant to repair, &c.' The lessor cannot avoid the lease after he has parted with the reversion.⁴ Nor can the grantee of the reversion avoid the lease for a forfeiture committed before the reversion was conveyed to him.* The lessor may enter and take actual possession at any time after the forfeiture has accrued and before he has waived such forfeiture,* but not afterwards.' The bringing of an ejectment for the forfeiture is equivalent to an entry, and amounts to an election to determine the term from the day on which the plaintiff claims to be entitled to possession, so as to prevent the recovery of any *subsequent rent*.* No act or intimation of election on the part of the plaintiff to avoid the lease is necessary *before* bringing an ejectment;* unless, indeed, the lease be for a life or lives." But no such election will avail, nor can an entry or ejectment be supported, after the lessor has waived the forfeiture by the acceptance of subsequent rent or otherwise," provided he then knew of the forfeiture, but not otherwise."

Arnsby v. Woodward, 6 B. & C. 519; Roberts v. Davey, 4 B. & Ad. 664; Nash v. Birch, 1 M. & W. 402; Reid v. Parsons, 2 Chit. R. 247.

¹ Roberts v. Davey and Arnsby v. Woodward, ante; Fenn d. Matthews v. Smart, 12 East, 444; Baylis v. Le Gros, 4 C. B. N. S. 537.

² Hartshorne v. Watson, 4 Bing. N. C. 178; Load v. Green, 15 M. & W. 216; Selby v. Brown, 7 Q. B. 620; Franklin v. Carter, 1 C. B. 750; Johns v. Whitley, 8 Wils. 127; Attorney-General v. Cox, 3 H. L. Case. 240.

³ Woolcock v. Dew, 1 F. & F. 337; Davies v. Underwood, 2 H. & N. 573; Maddock v. Mallett, 12 Ir. C. L. R. 173.

⁴ Matthews v. Smart, 12 East, 441, 451; Marriott v. Edwards, 5

B. & Ad. 1065; Prior v. Ongley, 10 C. B. 25.

⁵ Matthews v. Smart, 12 East, 441.

⁶ Davis v. Burrell, 10 C. B. 821; Baylis v. Le Gros, 4 C. B. N. S. 537.

⁷ Arnsby v. Woodward, 6 B. & C. 519; Doe d. Griffith v. Pritchard, 5 B. & Ad. 765.

⁸ Jones v. Carter, 15 M. & W. 718; Franklin v. Carter, 1 C. B. 750; Cole Ejec. 82, 408.

⁹ Hyde v. Watts, 12 M. & W. 254; 1 Smith L. C. 20.

¹⁰ Co. Litt. 218; 2 Coke, 53 a, 1 Wms. Saund. 237 d (n.); 4 Tyr. 625.

¹¹ Griffith v. Pritchard, 5 B. & Ad. 765; Gatehouse v. Rees, 4 Bing. N. C. 884; Litt. s. 181; Co. Litt. 211b.

¹² Gregson v. Harrison, 2 T. R. 425; Walter v. Davids, 2 Cowp. 803; Duppa v. Mayo, 1 Wms.

SEC. 227. *What avoids a lease.*—A lease by deed may be avoided by matter *ex post facto*, as, by erasure, interlineation, or other alteration in any material part.¹ A deed executed with blanks in material parts, whereby it is incapable of having any operation, and afterwards filled up and delivered by another person, in the absence of the party who has executed, and unauthorized by instrument under seal, is invalid.² The addition by stranger of a seal to an instrument signed only, renders it void.³ Where by agreement between plaintiff and defendant, a house, No. 38, was let to the plaintiff, and after the agreement was executed and delivered to the plaintiff, the number was altered to 35, but it did not appear by whom, No. 35 being in fact the house let; it was held that the agreement might be given in evidence in an action for an excessive distress, in which the demise was admitted to show the terms of the holding.⁴ If a deed is altered by a stranger in a point not material, it is not avoided; but it is otherwise if it is altered by a stranger in a material point; for the witnesses cannot prove it to be the act of the party where there is any material difference. An immaterial alteration, however, does not change the deed, and consequently the witnesses may attest it without danger of perjury; but if the deed be altered by the party himself, though in a point not material, yet it avoids it, for the law takes every man's act most strongly against himself. Alterations made in a deed by the grantee, after the execution thereof, though material, will not prevent the deed being received in evidence on his behalf to show the estate which passed by it, and which was not divested by these alterations.⁵ If there be several covenants in a deed, and one of them is altered, this destroys the whole deed, for it cannot be the same, unless every covenant of which it consists be the same also. A lease may be rendered invalid

Saund. 288 a, b, n. (16); Pennant's Case, 3 Coke R. 64 b.

¹ 2 Blac. Com. 808; Bennett v. Vade, 2 Atk. 827; Miller v. Mayn-
waring, Cro. Car. 899; Bull N. P.
287; Rex v. Beck, 2 Stra. 1160.

² Hibblewhite v. M'Morine, 6 M.
& W. 200.

³ Davidson v. Cooper, 11 M. &
W. 778.

⁴ Hutchins v. Scott, 2 M. & W.
809; Stewart v. Aston, 3 Ir. C. L.
N. S. 85.

⁵ Stewart v. Aston, ante.

by breaking off or defacing the seal, unless it is done by accident; thus, on an indenture being offered in evidence, with the seals torn off, it being proved to have been done by a little boy, the indenture was allowed to be read. A lease may also be invalidated by delivering it up to be cancelled. But the calling of a lease by the mutual consent of both parties does not destroy the term vested in the lessee, and the lessor may therefore maintain an action of debt on the demise for the recovery of the rent;¹ and notwithstanding such cancellation, the deed may be given in evidence to show the estate passed.² By the disagreement of those whose concurrence is necessary in order for the deed to stand; as the husband, where a wife is concerned; an infant, or a person under duress, when those disabilities are removed, and the like. So, too, a lease may be rendered inoperative by the judgment or decree of a court of competent jurisdiction.³ A proviso or condition in a lease, that upon non-payment of rent, or non-performance of covenants, or upon the bankruptcy of the lessee, or upon any other event, the lease shall become utterly void, means voidable only, that is, void at the election of the lessor, who must by some act signify his election to avoid the deed; which will become void from that time only: but previous arrears of rent, and damages, for previous breaches of covenant, may be recovered after the deed has been so avoided.⁴ Where a lease was granted to a man on his fraudulent representation that he intended to use the premises for carrying on a lawful trade, he intending at the time to use them, and afterwards using them, as a brothel, the representation being collateral to the agreement, was held not to avoid the lease.⁵

¹ Lord Ward v. Lumley, 5 H. & N. 87, 656.

² The Agricultural Cattle Ins. Co. v. Fitzgerald, 16 Q. B. 432; Stewart v. Aston, ante.

³ 2 Blac. Com. 808.

⁴ Hartshorne v. Watson, 4 Bing. N. C. 178; Woolcock v. Dew, 1 F. & F. 337; Davies v. Underwood, 2 H. & N. 573.

⁵ Feret v. Hill, 15 C. B. 207. But, if a person agrees to let premises

to another, and he subsequently ascertains that the lessee intends to use them for an unlawful purpose, such facts will operate as a full defence to an action for refusing to carry out the agreement. Thus, in an English case, the defendant agreed to let rooms to the plaintiff; afterwards, learning that they were to be used for lectures maintaining that the character of Christ is defective and his teaching mis-

But if the lease had not been actually granted, it might have supported a plea of fraud to an action for not granting the lease.¹ Where the lessor knew that the lessee took the premises for the purpose of using them as a brothel, notwithstanding an express covenant therein contained not so to use them, the lease was held void, and that no rent or damages for breaches of covenant was recoverable.² In covenant for rent it is a good defence that the premises were demised by the plaintiff to the defendant for the express purpose of being used for purposes contrary to the provisions of any statute.³ An assignment of a lease obtained by false and fraudulent representations is not void at law, where something more than a simple avoidance of the deed is necessary to complete justice between the parties.⁴

SEC. 228. *Concurrent leases.*—A concurrent lease is one granted for a term which is to commence *before* the expiration or other determination of a previous lease of the same premises, made to another person,⁵ or in other words, an assignment of a part of the reversion, entitling the lessee to all the rents accruing upon the previous lease, after the date of his lease, and all the remedies against the tenant under the prior lease, which his lessor would have had except for the assignment.⁶ But, unless under seal, it does not have this effect, because it does not come within the provisions of the statute 32 Hen. 8, chap. 34.⁷ No attornment of the tenant in possession is necessary as against the lessor;⁸ but unless there has

leading, and that the Bible is no more inspired than any other book, he refused to allow the use of the rooms, but did not give this as a reason for the refusal. In an action for breach of contract, it was held, that the purpose for which the plaintiff intended to use the rooms was blasphemous and illegal, and that the contract could not be enforced at law; and that the defendant might justify his refusal on this ground, notwithstanding his having given a different reason. *Cowan v. Milbourn*, L. R., 22 Exchq. 280.

¹ *Calvaleiro v. Puget*, 4 F. & F. 537;

² *Smith v. White*, 10 Mar. 1866, *KINDERSLEY*, V. C.

³ *Gas Light Co. v. Turner*, 5 Bing. N. C. 666; 6 id. 324.

⁴ *Stewart v. Aston*, 8 Ir. C. L. N. S. 35. But see *Evans v. Edmonds*, 13 C. B. 777; *Canham v. Barry*, 15 C. B. 597.

⁵ *Woodfall's L. & T.* 170.

⁶ *Harmer v. Bean*, 3 C. & K. 307.

⁷ *Bickford v. Parson*, 5 C. B. 920;

Studen v. Christmas, 10 Q. B. 135.

⁸ *Edwards v. Wickmar*, L. R., 1 Eq. Cas. 408.

been an attornment by the tenant, the reversion does not pass, but only an *interesse termini*,¹ nor until notice of such assignment of the lease can the assignee charge the lessee for rent previously paid to the lessor;² but the lessor will be liable to the second lessee for the amount received by him from the tenant, as, for so much money had and received.³ When the lessee himself takes and accepts a concurrent lease, it operates an implied surrender of his previous term, and the last lease becomes operative as a lease in possession for the term named in it, upon the principle that the same person cannot, at the same time, be both lessee and reversioner;⁴ but even where there is a merger of estates, it seems that the lessee is still bound in equity to perform those covenants in his first lease that are made for the benefit of adjoining premises belonging to the lessee or his grantees. Thus, A being possessed of a piece of land for a term of ninety-nine years, laid it out in plots, and underleased one plot to the defendant for the residue of the term, less three days, the defendant covenanting not to build more than twenty feet in height on that side of his plot which adjoined a narrow passage. A underleased another plot, which abutted on the other side of the passage to the plaintiffs. On A's death, the estate was sold under conditions which provided that the purchaser of the largest lot in value should take an assignment of the whole, and grant fresh underleases to the various underlessees, for the residue of the term of ninety-nine years, less two days. The defendant purchased his own plot, and the plaintiffs purchased their plot, which was the largest in value. The plaintiffs took an assignment of the whole, and granted a fresh underlease to the defendant of his lot for the residue of the term, less two days, at an apportioned ground-rent.

¹ Edwards v. Wickmar, ante; Agar v. Brown, 2 E. & B. 331; 4 Bacon's Abr. Tit. Leases (N).

² Cook v. Maylan, 1 Exchq. 67; Moss v. Gallimore, Doug. 279; Waddilove v. Barnett, 2 Bing. N. C. 538; Lumley v. Hodgson, 16 East, 99.

³ Neate v. Harding, 6 Exchq. 349;

Smith v. Jones, 1 Dowl. N. S. 526; Watson v. McLean, E. B. & E. 75.

⁴ Davidson v. Stanley, 4 Burr. 2210; Crawley v. Vitty, 7 Exchq. 319; Furnivall v. Grove, 8 C. B. N. S. 496. The matter embraced in this section will be fully treated *post*, under the heads of Assignment and of Surrender.

It was held that though the defendant's original underlease was merged at law, he was still bound in equity to observe his building covenant; and that the plaintiffs could obtain an injunction to restrain him from infringing it.¹

SEC. 229. *Estoppel—Leases by.*—Estoppels are said to be odious in law, as they have a tendency to prevent an investigation of the truth.² They are said to be an impediment or bar raised by law upon a man's own deed to his averring or proving anything in opposition to what he has once so solemnly and deliberately declared.³ It may be said to be a *conclusion*, from its determining, finishing, closing or shutting up the mouth, so that the party cannot speak, plead or claim anything contrary to his deed.⁴ In order to be operative, they must be certain to every intent, and precise, clear and unequivocal,⁵ and mutual,⁶ and both parties must be bound thereby, or neither is.⁷ Therefore, if one party is an infant, or a

¹ Birmingham Joint Stock Co. v. Lea, 36 L. T. Rep. N. S. 843, Ch. Div. See *post* Merger.

² Rex v. Lubbenham, 4 T. R. 255; Co. Litt. 865 b; Bacon's Abr. Tit. Joint Tenants (H) 1; Skipwith v. Green, 8 Mod. 811; Abbott v. Wilbur, 23 La. An. 868; Comyn's Digest, Tit. Estates (K) 8; Woodfall's L. & T. 172. "Estoppels, in general," said LORD KENYON, in the case first cited, *supra*, "are not to be favored; they are to be extended only so far as the positive rules have gone: because the tendency of them is to prevent the investigation of the truth of the case." But however odious an estoppel may be, there is apparent justice in holding that a person who, by his words, conduct or deed has induced another to believe in the existence of a certain state of facts, and to act upon them as such, should not be permitted to aver a different state of facts to such person's prejudice, and the courts do not and will not permit it. Roe v. Jerome, 18 Conn. 188; White v. Langdon, 30 Vt. 599; Forsyth v. Day, 46 Me. 176; Cook v. Finkler, 9 Mich. 131;

Bowen v. Buck, 28 Vt., 308; Garrison v. Garrison, 29 N. J. L. 158; Wyman v. Perkins, 39 N. H. 218; Laski v. Goldman, 18 La. An. 294; Rigney v. Smith, 39 Barb. (N. Y.) 388; Cooke v. Kuykendall, 41 Miss. 65; Crockett v. Lashbrook, 5 T. B. Mon. (Ky.) 530; Plumer v. Lord, 9 Allen (Mass.) 455.

³ 2 Blackstone's Com. 295; Comyn's Digest, Tit. Estoppel (A).

⁴ Co. Litt. 87 a, 170 a. The ground upon which estoppels are allowed is, that, when a man, without fraud on the part of the other party, does or alleges that upon which others have acted and believed to be true, it must be presumed to be true, and he ought not to be permitted to deny it to that other's prejudice. Co. Litt. 352 a, n. 1.

⁵ Rich v. Atwater, 16 Conn. 409; Lajoie v. Prineau, 8 Mo. 529; Clark v. Cuerdin, 2 John. (N. Y.) Cas. 353.

⁶ Lansing v. Montgomery, 2 John. (N. Y.) 882; Smith v. Law, 1 Atk. 489; Bacon's Abr. Tit. Estoppel (O).

⁷ Longwell v. Bently, 8 Grant's Cas. (Penn.) 177; Schumann v. Garratt, 16 Cal. 100.

feme covert, it will not operate as an estoppel,¹ nor can any one who is not bound by, avail himself of it.² So, too, it must not be induced by the fraud of the other party, nor the result of an innocent mistake on the part of the person sought to be bound by it.³

SEC. 230. **After purchase of estate.**—If a person leases land for years, to which he has no title, but to which he subsequently acquires one, the lease which before operated by estoppel became only a lease in interest.⁴ Thus, if A makes a lease to B of certain lands to which, at the time when the lease was made, he had no title, the lease is good against A by estoppel, but is not good as against the real owner. But if A subsequently purchases the estate, the lease thereupon becomes a lease in interest, and A is estopped from setting up the fact that he had no title when the lease to B was made, in avoidance thereof.⁵ So, where an heir makes a lease of lands before the death of his ancestor, if the ancestor dies before the time named in the lease expires, it instantly attaches to the estate as a lease in interest.⁶ But, in order to operate

¹ *Lackman v. Wood*, 25 Cal. 147; *Bacon's Abr. ante*; *Smith v. Law*, ante; *Clark v. Goddard*, 39 Ala. 164; *Brown v. McAme*, 5 Sandf. (N. Y.) 224.

² *Lansing v. Montgomery*, ante; *Cuttle v. Brockway*, 32 Penn. St. 45; *Wood v. Pennell*, 51 Me. 52. Parties and privies only are bound, and in order to be binding the estoppel must be mutual, *Griggs v. Smith*, 12 N. J. L. 22; *Griffin v. Richardson*, 11 Ired. (N. C.) L. 489; *Langer v. Filton*, 1 Rawle (Penn.) 141; *Worcester v. Green*, 3 Pick. (Mass.) 425; *Deery v. Cray*, 5 Wall. (U. S.) 795; *Nutvell v. Tongue*, 22 Md. 419; *Williams v. Chandler*, 25 Tex. 4, and can never be set up by a stranger, or one who is not bound by it. *Louis v. Castleman*, 27 Tex. 407; *Massure v. Noble*, 11 Ill. 531; *Miles v. Miles*, 8 W. & S. (Penn.) 185; *Wright v. Hazen*, 24 Vt. 143; *Langton v. McKinne*, 2 Murph. (N. C.) 67. The government, national or State, is not bound by them, *Johnson v. U. S.*, 5 Mas. (U. S.) 425; *Taylor v. Shaford*, 4 Hawks

(N. C.) 116; nor is the grantee of the government. *Candler v. Lunsford*, 4 Dev. & B. (N. C.) L. 407.

³ *Pierpont v. Barnard*, 5 Barb. (N. Y.) 364. In *Jackson v. Spear*, 7 Wend. (N. Y.) 401; *Jackson v. Ayres*, 14 John. (N. Y.) 224; *Stoughton v. Lynch*, 2 John. Cas. (N. Y.) 353.

⁴ *Webb v. Austin*, 7 M. & G. 701; 4 *Bacon's Abr. Tit. Leases* (O) 189; *Co. Litt.* 47, 227 a; *Doe v. Ongley*, 10 C. B. 25; *Smith v. Law*, 1 Atk. 489; *Sturgeon v. Wingfield*, 15 M. & W. 224; *Doe v. Fuller*, Tyr. & G. 17.

⁵ *Bacon's Abr. Tit. Leases* (O) 189.

⁶ *Rothwell's Case*, Hut. 91; *Anonymous*, Dal. 27, pl. 4; *South v. Law*, ante; *Rawlin's Case*, 4 Coke, 53 a; *Isham v. Morrice*, Cro. Car. 109; *Hermitage v. Tompkins*, 1 Ld. Rayd. 729; *Goodtitle v. Morse*, 3 T. R. 371, and the same rule prevails as to one who makes a lease of lands which he claims under a devise, before the title has vested in him, *Hooks v. Bellamy*, 1 Keb. 530, or by a tortfeasor. *Paulin v. Hardy*, Skin. 2, 62.

as an estoppel, the lands must be particularly described ; for, if a demise be made of all the lands which the lessor had in Dale, and he had no lands at the time when the lease was made, it is said that it will fail, for its generality, to create an estoppel against the lessor if he subsequently acquires land there.' It was formerly held that a lease could not become operative by way of estoppel, when it appeared upon its face that the lessor had no title ;¹ but that if the lessor falsely recited that he had no title to the lands, the recital would be void, and the lease would be operative by way of estoppel.² But this doctrine has been overruled, and whatever may be the recital as to title, in the lease, it will enure by estoppel if the lessor subsequently acquires title to the lands.³

Under the rule that both parties must be bound, it is held that a lease cannot operate by way of estoppel unless both parties sign it ;⁴ consequently, a lease by deed poll will not operate by way of estoppel, because the lessee is not bound thereby,⁵ but a lease executed by the lessor, and a counterpart executed by the lessee, although not indented, is treated as one instrument, and such a lease will operate by way of estoppel.⁶ If any interest passes under a lease⁷ it cannot operate by way of estoppel.⁸ An estoppel is not confined to the parties to the lease, but is annexed to the estate, *and is binding alike*

¹ Jenkin's Cent. 225, Case 46.

² Lumley v. Scarborough, 3 Ad. & El. 2 ; Hermitage v. Tompkins, ante ; Jeffreys v. Bucknell, 2 B. & Ad. 278 ; Cooks v. Bellamy, 1 Keb. 531 ; Montgomery's Case, 2 Dyer, 244 a ; Noak v. Amador, Cro. Eliz. 373 ; Frontin v. Small, 2 Ld. Rayd. 418 ; Ludford v. Barber, 1 T. R. 86 ; Barber v. Lawrence, 4 Taunt. 23 ; Pargeter v. Harris, 7 Q. B. 106. MARTIN, B., in Cuthbertson v. Irving, 4 H. & N. at p. 757.

³ Jenkin's Cent. 255, Case 46.

⁴ Morton v. Woods, L. R., 4 Q. B. 293 ; Jolly v. Arburthnot, 4 DeG. & J. 224.

⁵ Co. Litt. 47 a, 363 b ; Pike v. Eyre, 9 B. & C. 909 ; Hooks v. Bellamy, 1 Keb. 536 ; Hillman v. Hore, Carth. 247 ; Cardwell v.

Lucas, 2 M. & W. 111 ; Palmer v. Ekins, 2 Ld. Rayd. 1550 ; Wilson v. Woolfryes, 6 M. & S. 341 ; Wood v. Day, 7 Taunt. 646 ; Hill v. Saunders, 9 B. & C. 534 ; Atkinson v. Coatsworth, 8 Mod. 30.

⁶ Co. Litt. 363 b ; Atkinson v. Coatsworth, 1 Stra. 512 ; Smith v. Low, 1 Atk. 489.

⁷ Wilson v. Woolfryes, ante.

⁸ By interest, is meant *legal* interest. Blake v. Foster, 8 T. R. 496.

⁹ Cuthbertson v. Irving, 4 H. & N. 742 ; Appd. 6 id. 135 ; Treport's Case, 6 Coke, 14 a ; Hill v. Saunders, 4 B. & C. 529, 2 Bing. 112 ; 2 C. & P. 80 ; Fawcett v. Hall, Alc. & Nap. 248 ; Strode v. Seton, 1 Gale, 303. The reason given for this rule is, that one deed cannot so enure to two interests. Bere-

*upon all parties claiming under them.*¹ If a mortgagor makes a lease, and after performance of the condition in the mortgage conveys the estate, the grantee takes the estate subject to the lease.² Privies in law, as tenants by curtesy, dower, elegit, &c., are also bound by, or may avail themselves of, the estoppel.³

Not only the tenant but all who claim under him, so long as they remain in possession, are estopped from denying the title of the landlord from whom the possession was derived,⁴ but he may show that such title has expired.⁵

SEC. 231. Effect of estoppel on the lessor.—A grantor by deed is estopped from saying that he had no inter-

ton v. Evans, Cro. Eliz. 700. Illustrative of the rule, if a tenant *per autre vie* leases for twenty-one years, and subsequently purchases the fee, and the *cestui que vie* dies, the lessor may avoid the lease, because an interest passed for the life of the *cestui que vie*. Co. Litt. 47 b; Treport's Case, ante; Palmer v. Ekins, 2 Stra. 817; 11 Mod. 407. The questions involved under this head, and indeed covering nearly all the important questions likely to arise under leases by estoppel, are fully and ably reviewed by MARTIN, B., in Cuthbertson v. Irving, ante, and the reader is specially referred to it.

¹ Cuthbertson v. Irving, 4 H. & N. 757; Webb v. Austin, 7 M. & G. 701; Trevivan v. Lawrence, 6 Mod. 256; Faulkner v. Morse, 8 T. R. 371; Rawlyn's Case, 4 Coke, 58 a. "Where," says SERJ. WILLIAMS, Walton v. Waterhouse, 8 Saund. 418, n., a, "the grantor or lessor has nothing in the land at the time of the grant or lease, and therefore no interest passes out of him to the grantee or lessee by the grant or lease, but the title begins by the estoppel which the deed creates between the parties, such estoppel runs with the land." All who are privies in blood, Rothwell's Case, Hilt. 91; Anonymous, Mo. 20, pl. 69; Weale v. Lawer, Pollexf. 54; Kesselman v. Ald, 4 Dall. (Penn.) 168; Upshaw v. McBride, 10 B. Mon. (Ky.) 202, or in estate are bound by the estoppel.

Webb v. Austin, 8 Scott, N. R. 419; Iseham v. Morrice, Cro. Car. 109; Trevivan v. Lawrence, 1 Salk. 276. The lessor's assignee may avail himself of it. Palmer v. Ekins, 11 Mod. 407; Co. Litt. 352 a; Parker v. Manning, 7 T. R. 537. But privies in blood will not be bound unless the estoppel would have been operative against his ancestor. Carvick v. Blargrave, 1 B. & B. 531; Gilman v. Hore, 1 Salk. 275; Blake v. Foster, 8 T. R. 487; Treport's case, 6 Coke, 15 a.

² Edwards v. Omellhallum, March, 64; Rawlyn's Case, ante.

³ Co. Litt. 352 a; Weale v. Lawer, ante; Palmer v. Ekins, 2 Ld. Rayd. 1551.

⁴ Bac. Abr. (O.) 189; Smith v. Low, 1 Atk. 489; Webb v. Austin, 7 M. & G. 701; Doe v. Fuller, 1 Tyr. & G. 17; Sturgeon v. Wingfield, 15 M. & W. 224; Doe v. Ongley, 10 C. B. 25; Barwick v. Thompson, 7 T. R. 488; Taylor v. Needham, 2 Taunt. 278; Doe v. Mills, 2 Ad. & El. 17; Doe v. Austin, 2 Moo. & Sc. 107; London and North-Western Ry. Co. v. West, L. R., 2 C. P. 553; Cuthbertson v. Irving, 4 H. & N. 743; affirmed 6 H. & N. 135. See per BAYLEY, J., 8 B. & C. 475; White v. Foljambe, 11 Ves., at p. 344; Parry v. House, Holt, N. P. 489; Cooper v. Blandy, 1 Bing. N. C. 45; Doe v. Baytup, 3 Ad. & El. 188; Delaney v. Fox, 3 C. B. N. S. 768.

⁵ England v. Slade, 4 T. R. 682. See per BEST, C. J., in 2 Bing. 11; Neave v. Moss, 1 Bing. 360; Doe v.

est.' So a lessor is estopped by the lease from denying that he had any estate in the land at the time the lease was executed by him, or that he had no right to dispose of the possession during the term thereby expressed to be granted.' So a tenant, so long as he retains possession under the lease, is estopped from disputing the lessor's title.* And this is so even where the lease is not under seal or is by parol.⁴ Upon the execution of a lease which operates by estoppel, there is in contemplation of law, created in the lessor, a reversion in fee simple by estoppel, which passes by descent to his heir, and by purchase to his assignee or devisee, who may sue on the covenants in the

Edwards, 5 B. & Ad. 1065; Doe v. Ramsbotham, 3 M. & S. 516; Doe v. Watson, 2 Stark. 280; Mountney v. Collier, 1 E. & B. 680.

¹ Beale v. Hall, 22 Ga. 481; Wilkinson v. Scott, 17 Mass. 249; Currier v. Earl, 18 Me. 216; Case v. Benedict, 9 Cush. (Mass.) 540; Wickersham v. Orr, 9 Iowa, 253; Allen v. DeWitt, 3 N. Y. 276; Levy v. Horne, 3 Q. B. 757; Hurst v. Clifton, 4 Ad. & El. 813; Leeming v. Skirrow, 7 Ad. & El. 157; Gaisford v. Stone, 3 C. B. 176. He will not be heard as a witness to impeach the title, McIlldowny v. Williams, 28 Penn. St. 492, as, that it was given to defraud creditors, Bealo v. Hall, ante, and this is so even as to a married woman who has joined with her husband in a conveyance of her lands. Barbett v. Ruth, 16 La. An. 271; Noah v. Shofford, 10 Met. (Mass.) 192; Hill v. West, 8 Ohio, 222.

² Green v. James, 6 M. & W. 656; Darlington v. Pritchard, 4 M. & G. 783.

³ Tondro v. Cushman, 5 Wis. 279; Sims v. Glazner, 14 Ala. 695; Pope v. Harkins, 16 id. 321; Cranz v. Kroger, 22 Ill. 74; Burke v. Hale, 9 Ark. 324; Hoen v. Simmond, 1 Cal. 119; McIntyre v. Patton, 9 Humph. (Tenn.) 447; Tewksbury v. Magroff, 33 Cal. 237; Walden v. Bodly, 14 Pet. (U. S.) 156; Cowley v. Chiles, 5 J. J. Mar. (Ky.) 302; Winston v. President, 23 Miss. 118; Rogers v. Waller, 4 Hayw. (Tenn.) 205; Anderson v. Darby, 1 M. & W. (S. C.) 369; Alwood v. Mansfield, 33 Ill. 452;

Walker v. Harper, 33 Mo. 592; Johnson v. Stiles, 1 Cow. (N. Y.) 575; Robinson v. Hathaway, Brayt. (Vt.) 151; Bowdiah v. Dubuque, 38 Iowa, 341; Fuller v. Sweet, 30 Mich. 237; Evans v. Bidwell, 76 Penn. St. 497; Abbot v. Crombie, 72 N. C. 292; Baker v. Noll, 59 Mo. 265; Clarke v. Clarke, 51 Ala. 493; Phillips v. Robertson, 2 Overt. (Tenn.) 399; Jackson v. Stewart, 6 John. (N. Y.) 34; Jackson v. Vosburgh, 7 id. 186; Graham v. Moore, 4 Watts (Penn.) 467; Jackson v. Harper, 5 Wend. (N. Y.) 246; Galloway v. Ogle, 2 Binn. (Penn.) 462; Hamit v. Lawrence, 2 A. K. Mar. (Ky.) 366; Moore v. Beasley, 3 Ohio, 294; People v. Siner, 45 Barb. (N. Y.) 56; Lockwood v. Walker, 3 McLean (U. S.) 431; Hatch v. Pendergast, 15 Md. 251; Swift v. Gage, 20 Vt. 224; St. John v. Quitzow, 72 Ill. 334; Earle v. Nale, 31 Ark. 470; Ryder v. Mansell, 6 Me. 167; Hatch v. Bullock, 57 N. H. 15; Thrall v. Omaha Hotel Co., 5 Neb. 295; Stott v. Rutherford, 92 U. S. 107; Hughes v. Watt, 28 Ark. 153; Bertram v. Cook, 32 Mich. 518; Daggett v. Norton, 20 Ill. 332; Stacy v. Bostwick, 48 Vt. 192; Higgins v. Turner, 61 Mo. 249; Rose v. Davis, 11 Cal. 133; Brahn v. Jersey City Forge Co., 33 N. J. L. 74; Grant v. White, 42 Mo. 235.

⁴ Willis v. Birchmore, 9 Ad. & El. 662; Bailey v. Foster, 3 C. B. 229; Ayar v. Young, Car. & M. 78; Johnson v. Baytup, 3 Ad. & El. 186.

lease.¹ An underlease made by a lessee who, at the time of making it and subsequently, had no legal interest, operates as a demise by estoppel.² A lessor is estopped from setting up that he merely had an equitable estate when the lease was made.³ The principle that a tenant cannot impeach his landlord's title, or set up a title in himself, acquired during the tenancy, inconsistent with the title of his landlord, which he has admitted by accepting the demise, does not preclude him from availing himself of any defense consistent with such admission. If the landlord has transferred his interest in the premises, the tenant, though estopped to deny the title of the landlord from whom he received possession, may still show that the transfer was invalid and passed no title to the claimant.⁴ And this, too, notwithstanding he has paid rent to the claimant, or made an express agreement to become his tenant, if such payment, or agreement, were made in ignorance of, or under a mistake or misapprehension as to the title.⁵

SEC. 232. *Effect of estoppel on the lessee.*—It is a well settled general rule, that a lessee cannot deny the title of his landlord,⁶ and this rule applies whether the ten-

¹ Cuthbertson v. Irving, ante.

² Prior v. Ongley, 10 C. B. 25.

³ Green v. James, 6 M. & W. 656; Sturgeon v. Wingfield, 15 M. & W. 224.

⁴ Carvick v. Blgrave, 1 B. & B. 581; Phillips v. Pearce, 5 B. & C. 433; Funk's Lessee v. Kincaid, 5 Md. 404; Despard v. Walbridge, 15 N. Y. 374.

⁵ Rogers v. Pitcher, 6 Taunt. 202; Grovenor v. Woodhouse, 1 Bing. 38; 7 Moore, 289; Fenner v. Duplock, 2 Bing. 10; Gregory v. Doidge, 3 id. 474; Brook v. Biggs, 2 Bing. N. C. 572; Claridge v. McKenzie, 4 Scott (N. R.) 796; Washington v. Conrad, 2 Humph. (Tenn.) 563; Shelton v. Carroll, 16 Ala. 148; Swift v. Dean, 11 Vt. 323; Ingraham v. Baldwin, 9 N. Y. 45. DeWolf v. Martin, 12 R. I. 538.

⁶ Miller v. McBrian, 14 S. & R. (Penn.) 382; Shepard v. Martin, 31 Mo. 492; Cranz v. Croger, 22 Ill. 74; Plumer v. Plumer, 30 N.

H. 558; Walden v. Bodley, 14 Pet. (U. S.) 156; Tewksbury v. Magroff, 33 Cal. 237; Cody v. Quarterman, 12 Ga. 386; Atwood v. Mansfield, 33 Ill. 452. And especially is this so in an action for rent, Codman v. Jackson, 14 Mass. 93; Allen v. Chatfield, 8 Minn. 435; Watson v. Alexander, 1 Wash. (Va.) 840; Perkins v. Governor, Minor (Ala.) 342, and if there are two or more lessors he cannot deny the title of either of them. Wood v. Day, 7 Taunt. 646; Delaney v. Fox, 1 C. B. N. S. 166; Friend v. Eastabrook, 2 W. Bl. 1152; Langford v. Selmes, 3 Kay. & J. 220; Beckett v. Bradley, 7 M. & G. 994. The rule not only extends to the lessee but to his assignee or undertenant. Kluge v. Lachenaux, 12 Ired. (N. C.) L. 180; Blackeney v. Ferguson, 20 Ark. 547; McCrancy v. Ransom, 19 Ala. 430; Lunsford v. Alexander, 4 Dev. & B. (N. C.) L. 40; Millhouse v. Patrick, 6 Rich. (S.

ant was in possession before the lease was made or

C.) 350; *Rose v. Davis*, 11 Cal. 133. A stranger even, who comes into possession through the tenant, though by a purchase of the land, is subject to the rule. *Newman v. Mackin*, 21 Miss. 388; *Lockwood v. Walker*, 8 McLean (U. S.) 431; *Farley v. Rogers*, 1 A. K. Marsh. (Ky.) 245; *Phillips v. Rothwell*, 4 Bibb (Ky.) 33. The rule applies to a mortgagor and mortgagee, trustee and *cestui que trust*, and generally in all cases where one obtains possession by a recognition of the landlord's title. *Willison v. Watkins*, 3 Pet. (U. S.) 43. And whether the lease is by deed, in writing or oral, or even though he is in under an agreement for a lease merely or under a contract of purchase. *Love v. Edmonston*, 1 Ired. (N. C.) L. 152; *Dubois v. Mitchell*, 3 Dana (Ky.) 386; *Williams v. Cush*, 27 Ga. 507. In an action on a bond conditioned for the payment of the rent of certain premises recited in the condition, to be demised by indenture at a certain rent, the defendant is estopped from saying that by the indenture a less rent than that mentioned in the condition was reserved. *Lanison v. Tremere*, 1 Ad. & El. 792. In an ejectment for mines against a member of a mining company, it was held that the defendant was estopped from disputing the title of the lessor of the plaintiff who had leased the mines to the company, of which the lessor was a partner at the time of the action, but not at the time he granted the lease. *Francis v. Harvey*, 4 M. & W. 331. The lessee may, however, show that his landlord's title has expired, *Neave v. Moss*, 1 Bing. 363; *England v. Slade*, 4 T. R. 682; *Jackson v. Ramsbotham*, 3 M. & S. 516; *Strode v. Seaton*, 2 C. M. & R. 723; *Downes v. Cooper*, 2 Q. B. 256; *Agar v. Young*, 1 Car. & M. 78; *Claridge v. Mackenzie*, 4 M. & G. 143; *Leeming v. Skirrow*, 7 Ad. & El. 157; but where a defendant, in an action for use and occupation, had occupied apartments in a house belonging to a wife, and had paid rent to the husband, who subsequently, with the knowledge of the defendant, granted a lease

of the whole house to the plaintiff; it was held, that having occupied with notice of the lease, he could not impeach its validity, nor controvert the plaintiff's title. *Rennie v. Robinson*, 1 Bing. 147. Upon an information to set aside a lease of charity lands, it was held in Chancery that the lessees could not dispute the title by setting up an adverse title whilst they retained possession. *Atty.-Gen. v. Lord Hotham*, 3 Russ. 415. The interest of a tenant for life and a reversioner are the same, and therefore a lessee who has paid rent to the first, cannot set up title in another person as an answer to an action by the latter after the death of the former. *Colemore v. Whitroe*, 1 D. & Ry. 1. A lessee, by executing an indenture of lease, admits a will under which it is recited that the lease was granted. *Bringloe v. Goodson*, 5 Bing. N. C. 788. A lessee of tolls, under an instrument signed by two persons as trustees, admits they are trustees. *Willington v. Brown*, 8 Q. B. 169. An assignee is estopped by the deed which estops his assignor, *Taylor v. Needham*, 2 Taunt. 278; *Barwick v. Thompson*, 7 T. R. 488; *Bryan v. Winwood*, 1 Taunt. 208; and an assignor, by executing the assignment in which the original lease is recited, is precluded in an action by the assignee from calling upon him to prove the lease. *Nash v. Turner*, 1 Esp. 217. So an assignee of a void lease by a tenant for life is estopped from disputing the title of the remainder-man, though his assignment was after the death of the tenant for life, and payment to and acceptance of rent by the remainder-man, and with notice of that fact. *Johnson v. Mason*, 1 Esp. 89. So where a lease was granted by A and B as granting parties, and reserved the rent and right of re-entry to a close, it was held that the assignee of the lessor was estopped from showing that A had no interest in the premises. *Parker v. McLaughlin*, 1 Ir. L. R. N. S. 186. In defence of an action of ejectment, it may be shown that the parties under whom the plaintiff claims had no title when

not.¹ So long as he remains in undisturbed possession he is estopped from attacking the title under which he entered,'

they conveyed to him, although the defendant himself claims by a conveyance from the same parties, if the latter conveyance was subsequent to that which the defendant seeks to impeach. *Oliver v. Powell*, 1 Ad. & El. 531. Where a lease granted under a power contained in a settlement recited the title of the lessor, and showed that he had only an equitable interest, the lessee was held not to be estopped from disputing the title of the lessor so disclosed in the lease. *Greenway v. Hart*, 14 C. B. 348. The ground upon which the rule of estoppel in such cases rests, is the advantage derived by the tenant from being let into possession by the landlord, which would make it unjust and inequitable for him to use his portion thus acquired to undermine or defeat the landlord's rights, *Fuller v. Sweet*, 30 Mich. 237, and hence the rule that a tenant cannot set up a superior title acquired by him until he has first surrendered possession. *Freeman v. Heath*, 13 Ired. (N. C.) L. 498.

¹ *Richardson v. Harvey*, 37 Ga. 224; *Patterson v. Hunsell*, 4 Bush. (Ky.) 654; *Thyer v. Society*, 20 Penn. St. 60; *McConell v. Bowdry*, 4 T. B. Mon. (Ky.) 392; *Hockenbury v. Snyder*, 2 W. & S. (Penn.) 240. But in California the rule is otherwise, *Franklin v. Medina*, 35 Cal. 558; *Peratto v. Gonochio*, 47 id. 259, and in New York, *Jackson v. Leek*, 12 Wend. (N. Y.) 105, *Virginia, Alderson v. Merrill*, 15 Gratt. (Va.) 279, *Tennessee, Washington v. Conrad*, 2 Humph. (Tenn.) 562, and in South Carolina, *Givens v. Mallyneaux*, 4 Rich. (S. C.) 590, it was held that a person in possession is not estopped from subsequently disclaiming holding under such title if the original entry is not under the person whose title is acknowledged. And this is so in all the States if such acknowledgement was induced by fraud, *Glein v. Rise*, 6 Watts (Penn.) 44; *Jackson v. Harper*, 5 Wend. (N. Y.) 246; *Bryne v. Beeson*, ante, or was the result of mistake or misapprehension. *Miller v. Williams*, 15 Gratt. (Va.) 213;

Swift v. Dean, 11 Vt. 323; *Cramer v. Carlisle Bank*, 2 Crant's Cas. (Penn.) 267; *Smith v. McCurdy*, 3 Phila. (Penn.) 488. The rule adopted in California is certainly just, and does not seem to trench upon the general rule.

¹ *Paquetel v. Gauche*, 17 La. An. He cannot controvert the title of him under whom he holds, and whose title he has recognized, *Bremer v. Bigelow*, 8 Kan. 497; *Burnitt v. Rich*, 45 Ga. 211; *Jackson v. Whedon*, 1 E. D. S. (N. Y. C. P.) Ingraham v. Baldwin, 9 N. Y. 45; *Stout v. Merrill*, 35 Iowa, 47; even by taking a lease from another after his term is ended. *Jackson v. Stiles*, 1 Cow. (N. Y.) 575; *Jackson v. Hinman*, 10 John. (N. Y.) 293; *Phelps v. Taylor*, 23 La. An. 585; *Simmons v. Robertson*, 27 Ark. 527. If he denies the title, the landlord may, at his election, treat it as a disseizin. *It is in law a termination of the tenancy and equivalent to notice to quit.* *Hall v. Davey*, 10 Vt. 593; *Currier v. Earl*, 13 Me. 216; *Tillotson v. Doe*, 5 Ala. 407; *Stearns v. Godfrey*, 16 Me. 153; *Fussleman v. Worthington*, 14 Ill. 135. In an action of ejectment or for rent, the defendant, by admitting that he is the plaintiff's tenant, admits the plaintiff's title. *Millhaller v. Jones*, 7 Ind. 715; *Russell v. Erwin*, 38 Ala. 40; *Ingraham v. Baldwin*, 9 N. Y. 45. The fact that the lease is void, does not change the rule, or enable the tenant to dispute the title, but, after the relation has ceased, his right to do so is not impaired because he neglected to do so before. *Bryne v. Beeson*, 1 Dougl. (Mich.) 179; *Heath v. Williams*, 25 Me. 209; *King v. Murray*, 6 Ired. (N. C.) L. 62; *Aukenev v. Pierce*, 1 Ill. 202. He cannot set up a title acquired by adverse use while he was occupying either as tenant or licensee. *Coming v. Troy Nail Factory*, 34 Barb. (N. Y.) 485; *Brown v. Keller*, 32 Ill. 151; *Bryne v. Beeson*, 1 Dougl. (Mich.) 179; *Hatch v. Pendergrast*, 15 Me. 251. In order to gain such a title he must first disclaim, *Walden v. Badley*, 14 Pet. (U. S.) 156; *Duke v. Harper*, 6 Yerg. (Tenn.)

unless his entry was induced by the fraud of the landlord

280, and surrender the property before he will be permitted to assert them, *Reed v. Shepley*, 6 Vt. 602; *Tompkins v. Snow*, 63 Barb. (N. Y.) 525; *Hershay v. Clark*, 27 Ark. 527; *Brown v. Keller*, ante; *Ryerson v. Eldred*, 18 Mich. 12; *Greeno v. Munson*, 9 Vt. 87; *Moshier v. Redding*, 12 Me. 478; and statements of his own title will not be evidence unless brought home to the landlord, *Ingram v. Little*, 14 Ga. 173; and a tenant at will will not be permitted to set up an inconsistent title without surrender or eviction by the owner of a paramount title or its equivalent. *Town v. Butterfield*, 97 Mass. 105. He cannot avail himself of the purchase of an outstanding title to defeat the title of his landlord. *Clemm v. Wilcox*, 15 Ark. 102; *Russell v. Titus*, 3 Grant's Cas. (Penn.) 295; *Elliott v. Smith*, 23 Penn. St. 181. See *Gallagher v. Bennett*, 38 Tex. 291, and exception to rule, *post*. In order to create this estoppel, the relation of landlord and tenant must exist. It does not apply to a tort feazor or one who has not recognized the landlord's title. But if he has distinctly recognized the landlord's title, so that he can be said to hold under him, or in subserviency to his title, the rule applies. The best evidence of such recognition is the payment of rent or the taking of a lease, but these are not indispensable. *Hood v. Mathias*, 21 Mo. 308; *Plumer v. Plumer*, 80 N. H. 558; *Morse v. Roberts*, 2 Cal. 515. In Maine, it is held that there must be an actual surrender of the premises, and that notice to the landlord is not sufficient. *Longfellow v. Longfellow*, 61 Me. 590. If a tenant holds over after the termination of his lease, he cannot, by surrendering part of the premises, acquire a right to dispute the title of the landlord to the remainder. *Longfellow v. Longfellow*, 54 Me. 240; *Stoops v. Delvin*, 16 Mo. 162. A sub-tenant cannot dispute the title of his lessor or of his assignee. *Stagg v. Eureka Tanning Co.*, 56 Me. 317; *Dunshee v. Grundy*, 15 Gray (Mass.) 814; *Earle v. Hale*, 81 Ark. 470; *Prevot v. Lawrence*, 51 N. Y. 219. A tenant at suffer-

ance is bound by this estoppel, *Griffin v. Sheffield*, 38 Miss. 359; nor can a lessee of a tenant at will dispute the title of his lessor or of the landlord, *Hilbourn v. Fogg*, 99 Mass. 11; nor can the lessee for life, at law set up a conveyance by their intestate to a third person, of which he was ignorant when they leased to him. *Haws v. Shaw*, 100 Mass. 187. A tenant contracting to pay the taxes upon the premises, cannot, by permitting the lands to be sold for taxes and purchasing them at such sale, acquire any title thereto as against his landlord. *Cauthers v. Weaver*, 7 Kan. 110. But a tenant at will may at any time abandon his tenancy, and then take the same property by purchase from another, so as to avail himself of the statute of limitations; but the abandonment must be brought home to the knowledge of his landlord. *Hudson v. Wheeler*, 84 Tex. 356. A person who was in possession of land when the lease was made is estopped from setting up that the lessor holds the title merely as his trustee. *Lucas v. Brooks*, 18 Wall (U. S.) 436. For instances where, according to the rule in California, a tenant may set up a paramount title when he was in possession when the lease was made, see *Peratta v. Gonochio*, 47 Cal. 259; *Holloway v. Galliae*, 47 id. 474; *Franklin v. Mereda*, 35 Cal. 558; *Tewksbury v. Magroff*, 83 Cal. 237. The rule extends only to the lessor and his privies in blood or estate; as against a stranger, the tenant may set up a title in himself or a third person, *Cole v. Maxfield*, 13 Minn. 235. A person in possession of premises which are sold or set off upon an execution against him, becomes so far a *quasi* tenant as to be precluded from disputing the title of the purchaser upon execution *while he is in possession*, but not if he is *not in possession*. *Wood v. Turner*, 7 Humph. (Tenn.) 517. A person who enters as sub-tenant, although he subsequently acquires a perfect title to the lands, cannot set up such title against his lessor without first surrendering possession to him. He must give

or by a mistake in the execution of the lease,¹ or unless

up the advantage which he derived under the tenancy by being let into possession, before the estoppel is removed. *Callendar v. Sherman*, 5 Ired. (N. C.) L. 711; *Millhouse v. Patrick*, 6 Rich. (S. C.) 350; *Freeman v. Heath*, 18 Ired. (N. C.) L. 498. The rule applies where a party takes an undivided half of premises as purchaser, and the other half as tenant. In such a case he is estopped from denying the title of his lessor to the half leased to him. *Clark v. Crego*, 47 Barb. (N. Y.) 599.

¹ *Lively v. Ball*, 2 Mon. (Ky.) 58. In the case of *Mays v. Dwight*, recently decided by the Supreme Court of Pennsylvania, an oil well was leased which was supposed by both parties to be upon the land of the lessors, but turned out to be upon that of another person, who claimed rent. In an action in equity by the lessors to compel the lessee, in substance, to account for the rent, the court say: "Perhaps no rule of law is better settled than that a tenant in possession under a lease shall not be allowed to dispute the title of his lessor. Yet this rule like most others has its exceptions. *When the tenant has been induced to accept the lease by misrepresentation, fraud or trick practiced upon him by the lessor, he is not estopped from setting up a superior title to that of the lessor.*" *Hamilton v. Marsden*, 6 Binn. (Penn.) 45; *Brown v. Dysenger*, 1 Rawle (Penn.) 408; *Baskin v. Seechrist*, 6 Penn. St. 154. If a person falsely represents himself to be the owner of premises, and thus induces a person to take a lease from him, the tenant is not estopped from denying such person's title. *Glein v. Rise*, 6 Watts (Penn.) 44. In *Jenckes v. Cook*, 9 R. I. 520, it was held that a person whose assent to a lease was procured by the fraud of the other, was not estopped from denying the lessor's title. In *Gallagher v. Bennett*, 88 Tex. 291, it was held that, where the landlord was guilty of fraud in the execution of the lease, and is unable by reason of insolvency to indemnify the

tenant for rents wrongfully exacted, the tenant may purchase a superior title, *if he does so in good faith and from a well-grounded fear of eviction*, and set it up in defense to an action by the landlord to recover possession of the premises. In *Alderson v. Miller*, 15 Gratt. (Va.) 279, the defendant was in possession of the lands under a claim of title, but the defendant fraudulently led him to believe that the title was in him, and induced the defendant to take a lease from him. The court held that the defendant was not estopped from denying the plaintiff's title. See also *Pearce v. Nix*, 34 Ala. 183, where it was held that a person who had attorned to another under an honest belief that he had a better title than himself, was not estopped, upon discovery of the mistake, from disputing such person's title. Where a tenant leases his claim to dispute, the court may in its discretion, order the tenant to prove the fraud or mistake before he pass evidence of his title before the jury, or it may allow him to show title first, subject to the necessity of making that evidence competent by the removal of the estoppel by subsequent proof of the fraud. And if that proof is not made, the jury will be instructed to disregard the tenant's title previously proved. *Alderson v. Miller*, 15 Gratt. (Va.) 279. If it is shown that the tenant was induced to attorn to the plaintiff as landlord, in consequence of the plaintiff's fraud or misrepresentation, he is not estopped. *Schnetz v. Arratt*, 32 Mo. 172; *Tison v. Yawn*, 15 Ga. 471. Indeed the rule may be said to be that the tenant is never estopped from showing that the tenancy was induced by fraud, misrepresentation or misapprehension, *Swift v. Dean*, 11 Vt. 233; *Cramer v. Carlisle Bank*, 2 Grant's Cas. (Penn.) 287; *Smith v. McCurdy*, 3 Phila. (Penn.) 488, or otherwise unfairly obtained. *Brown v. Dyserger*, ante; *Isaac v. Clarke*, 5 Gill. (Md.) 1; *Miller v. Bonsadon*, 9 Ala. 817. W, lessee of certain premises for a term of seventy-five years, mortgaged the

the lease was made for purposes in violation of law,¹ or of improvements upon public lands specially reserved from sale so that the lessor's possession was unlawful.² The fact that the lease is void,³ or that the lessor had no title whatever,⁴ or that the title was really in the lessee, and he was ignorant of the fact when the lease was made, will not change the rule.⁵ Nor is the rule changed, although the lease was made to defraud the landlord's

lease to T, and joined with him in an indenture, by which, after reciting the mortgage, the premises were demised to J for twenty-one years. The mortgage was assigned to S, and by indenture, to which S and W were parties, after reciting the lease to J that lease was assigned to M. This assignment contained a covenant by M with W, that M would not demise or assign the premises without the license and consent of W, with a provision for re-entry if he did. M paid rent to W, and afterward assigned the premises to K, without the license or consent of W. In an action of ejectment by S and W, it was held, 1. That M was not estopped from showing that W was not legal owner of the reversion, but mortgagor only; and that W having a mere equitable interest, could not recover. 2. That S could not recover, because no right of re-entry was reserved to him. *Saunders v. Merryweather*, 3 H. & C. 902.

¹ In *Milton v. Hayden*, 32 Ala. 30, the landlord usurped the right to keep a public ferry, in violation of law, and leased it to the defendant. The court held that he could not, under these circumstances, claim from the lessee the allegiance due from a tenant to his landlord so as to estop him from disputing his title. See also *Satterlee v. Matthewson*, 18 S. & R. (Penn.) 133.

² *Dupas v. Wassell*, 1 Dill. (U. S. C. C.) 213.

³ *Byrne v. Buson*, 1 Dougl. (Mich.) 179; *Heath v. Williams*, 25 Me. 209; *King v. Murray*, 6 Ired. (N. C.) L. 62.

⁴ *Bowdish v. Dubuque*, 88 Iowa, 341. A tenant under a lease from one having possession and control of the premises, but no title to them (which lease contains a clause

that, in case lessors should cease to control or own the property, no rent should be paid, unless their successors should in writing confirm the lease), by holding under and paying rent to the successive assignees of the owner, is estopped from denying that they are assignees of his original lessor, and continues bound to pay rent to them in that character, or as having, by the instruments of confirmation, become new lessors. *Whalin v. White*, 25 N. Y. 462; *Flanders v. Train*, 18 Wis. 596; *Jackson v. Wheedon*, 1 E. D. S. (N. Y. C. P.) 141.

⁵ In *Baker v. Noll*, 59 Mo. 265, the tenant took a lease of the plaintiff who held the lands as trustee of the tenant's wife, but of which fact the tenant was ignorant when the lease was made. The court held that he was estopped. In *Abbott v. Cromartie*, 72 N. C. 292, the tenant was, in fact, entitled to the lands as a homestead, but he was ignorant of the fact when the lease was made. The court held that he was estopped. But *contra*, see *Cain v. Geinon*, 36 Ala. 168; *Shultz v. Elliott*, 11 Humph. (Tenn.) 183. A woman mortgaged a parcel of land to a bank. The bank foreclosed the mortgage and the husband of the woman agreed to pay rent for the same to the bank until the bank sold the land. Subsequently the bank conveyed the land, and the grantee brought an action, under the Pub. Sts. C. 175, against the husband to recover possession. The judge, who tried the case without a jury, found that the defendant was, at the time of the deed to the plaintiff, the tenant of the bank; and ruled that it was not open to the defendant to deny, in this action, the bank's title or

creditors.¹ But, in order to subject a party to this rule the relation of landlord and tenant must exist. By this it is not meant that the party must be in under a lease, or that he must pay rent; but if he is in possession by the permission of the owner, and has recognized his title in any way, it is enough.² A tenant in law, as a tenant by dower, elegit or curtesy, is estopped wherever the person from whom their title is derived would have been;³ and the rule also applies to a person who goes in under an agreement for a lease, or under a contract for the purchase of the premises, or under any arrangement which operates as a recognition of the landlord's title, and as holding under, or in subserviency to it.⁴ When

possession at the time of said deed. It was held that the finding was warranted by the evidence, and that the ruling was correct. *Granger v. Parker*, 137 Mass. 228.

¹ *Steen v. Wadsworth*, 17 Vt. 297.

² In *Downer v. Ford*, 16 Cal. 345, the defendant, having settled on and enclosed a vacant lot, told the owner that he would give it up when his family came, and afterwards he wanted to fence with boards, and it was agreed that he should do so, and that the owner should pay one-half of the expense, and at other times he recognized the owner's title. It was held in ejectment by such owner's vendee, that the defendant was estopped from disputing the title. In *Ward v. McIntosh*, 12 Ohio St. 231, M. being in possession of land, claiming title thereto, during his marriage with S, conveyed the same to W with covenant of general warranty, and delivered possession of the same to W, which W retained, deriving neither title nor possession from any other source. Upon the decease of M, S filed her petition against W to obtain dower in said premises. It was held that W, under such circumstances, in an application for dower by the widow of M, was precluded from showing a title in a third person with which he did not connect himself, or from claiming an adverse possession. In *Flanders v. Train*, 13 Wis. 596, F by agreement entered lands in the name of W, the profits of the transaction

and the lands to be divided between them in certain agreed proportions. F afterwards contracted with the defendant for the cutting of timber on the land, he to receive one-half for his services. He carried away all the timber cut. In a suit by F for his share of the timber, it was held that a defence of his want of title in the land was invalid, and that he was entitled to recover. In *Wyoming, &c., Co. v. Price*, 81 Penn. St. 156, a coal company, occupying lands adjoining to those of the defendant, having mined over their land into his lands, agreed to pay him for the coal mined on his land, as well as for all that they should mine for the next eight months, at a certain rate per ton. It was held that the relation of landlord and tenant did not exist between them under this agreement, and that they were not estopped from denying his title.

³ *Love v. Dennis*, Harp. (S. C.) 70; *Bufferlow v. Newsom*, 1 Dev. (N. C.) L. 208; *Gorham v. Brenon*, 2 id. 174. The tenant of a tenant by dower is estopped from disputing the title of the intestate. *Clarke v. Clarke*, 51 Ala. 498. A tenant in possession under a lessor whose lands are sold on execution, may, however, set up the title of the purchaser, in defence to an action for the rent accruing after the sale. *Lancashire v. Mason*, 75 N. C. 455.

⁴ *Dubois v. Mitchell*, 8 Dana (Ky.) 336; *Love v. Edmaston*, 1 Ired. (N. C.) L. 152.

the estate which the landlord held vests in the lessee, whether by purchase from the lessor or by purchase under valid legal proceedings, the tenant may set up this title in defence to any action brought against him by the lessor, either to recover possession of the premises, or to recover after accruing rent,¹ and indeed in all cases it is competent for the tenant to show that the landlord's title has terminated, as, that the premises have been sold under foreclosure proceedings,² under execu-

¹ *Ryder v. Manzell*, 66 Me. 197; *Shields v. Lozear*, 84 N. J. L. 496; 3 Am. Rep. 256.

² And it is competent for him to show that they were sold upon a mortgage given to himself, and that he became the purchaser at such sale, or that the condition upon which the mortgage to him was given, is broken. *Shields v. Lozear*, ante, and in those States where the common law rule prevails, and a mortgage is treated as conveying the fee, he may show that the landlord, subsequently to the lease, mortgaged the premises to him and that he holds as mortgagor, or that the landlord has mortgaged to a third person to whom he has been notified to attorn, *Pope v. Biggs*, 9 B. & C. 245; *Watson v. Lane*, 11 Exchq. 769. See ante, Chap. Leases by Mortgagors; or where his title has been extinguished in any manner subsequent to the making of the lease. *Camp v. Camp*, 5 Conn. 291; *Jackson v. Rowland*, 6 Wend. (N. Y.) 666; *Wheelock v. Warschaner*, 21 id. 809; *Randolph v. Carlton*, 8 Ala. 606; *McLevitt v. Sullivan*, 8 Cal. 592; *Deutch v. Newsom*, 8 Ohio, 57; *Walls v. Mason*, 5 Ill. 84; *Lawrence v. Miller*, 1 Sandf. (N. Y.) 516; *Tilghman v. Little*, 18 Ill. 239; *Ryress v. Farwell*, 9 Barb. (N. Y.) 615; *Kinney v. Doe*, 8 Blackf. (Ind.) 850; *Hoag v. Hoag*, 85 N. Y. 469; *Casey v. Gregory*, 13 B. Mon. (Ky.) 846; *Gregory v. Crab*, 2 id. 284; *Homer v. Leeds*, 25 N. J. L. 106; *Hintz v. Thomas*, 7 Md. 346; *Giles v. Elsworth*, 10 id. 383; *Howell v. Ashmore*, 22 N. J. L. 261; *Wolf v. Johnson*, 80 Miss. 518; *England v. Slade*, 4 John. (N. Y.) 682; *Russell v. Allard*, 18

N. H. 222; *Purtz v. Cuester*, 41 Mo. 447. After a judgment of eviction against the tenant, he may, without the landlord's consent, attorn to the successful party, although he has not actually been evicted, *Moffat v. Strong*, 9 Bos. (N. Y. Sup. Ct.) 57; *Lunsford v. Turner*, 5 J. J. Marsh. (Ky.) 104; *Foster v. Morris*, 3 A. K. Mar. (Ky.) 609; or he may show that the premises have been sold under a mortgage, execution, or for taxes, *Shields v. Lozear*, 84 N. J. L. 496; *Doe v. Ashmore*, 261; and if the sale is subsequently set aside, he may dispute the title of the purchasers and attorn to his original landlord. Thus, on a decree in favor of H, land was sold to him; he conveyed, and the purchasers entered and put in their tenant; on appeal, the sale was set aside, and a re-conveyance by a commissioner was ordered and executed: thereupon the tenant attorned, and afterwards gave possession to the original owner, to whom the re-conveyance had been so made. It was held, on ejectment by the purchasers, that the relation of tenancy did not estop the tenant so to attorn; that therefore after his attornment the original owner was in possession by him, under the new title by the re-conveyance, so that he was not in as sub-tenant of the plaintiffs, and therefore was not estopped to deny the plaintiffs' title, and the plaintiffs were called upon to show title in themselves. *Miller v. Williams*, 15 Gratt. (Va.) 213. This is upon the principle that if one in possession, under claim of title, is, by fraud or mistake, induced to believe that another has a better title, and thereupon to take a lease

tion, or for taxes, or indeed that the title of the landlord has, from any cause, expired.' So a tenant is not estopped when he has been induced to take a lease from the landlord by his fraud or misrepresentation, or under a misapprehension or mistake.' Neither is he estopped from setting up a paramount title in another, where he has been evicted, or a judgment of eviction has been obtained against him, nor when the payment of rent by him was merely gratuitous.' The estoppel exists only during his tenancy, express or implied. After that is ended, whether by surrender or otherwise, he may set up title in himself, or in a third person, and, as a tenant for years holding over after his term expired is treated as holding as tenant upon the terms of the former lease, he remains subject to the estoppel.' While a tenant is estopped from denying the title of his landlord, so long as the relation exists and is recognized between them, he may repudiate the relation, and set up an adverse claim and possession in him-

from him, the tenant will not be estopped. *Alderson v. Miller*, 15 Gratt. (Va.) 279.

¹*Doe v. Ashmore*, 23 N. J. L. 261. And he may set up the title of the purchaser under execution against the landlord in any action brought by the landlord, for matters accruing or occurring after such sale. *Lancashire v. Mason*, 75 N. C. 455.

²And, if the lessee buys in the whole or a part of the lessor's title at a tax or execution sale, or by private purchase, it is a proportionate defence to a suit for rent or ejectment. *Nellis v. Lathrop*, 23 Wend. (N. Y.) 121; *Elliott v. Smith*, 23 Penn. St. 181; *George v. Putney*, 4 Cush. (Mass.) 858; *Bettison v. Budd*, 17 Ark. 546; *Carnley v. Stanfield*, 10 Tex. 546. But if the tenant contracted to pay the taxes he cannot set up a tax title against the landlord. *Canthers v. Weaver*, 7 Kan. 110.

³*Doe v. Seaton*, 2 Cr. M. & K. 728; see ante, n.

⁴*Glein v. Rise*, 6 Watts (Penn.) 44; *Swift v. Deen*, 11 Vt. 323; *Baskin v. Sechrist*, 6 Penn. St. 154.

⁵*Schultz v. Elliott*, 11 Humph. (Tenn.) 188.

⁶*Moffat v. Strong*, 9 Bos. (N. Y. Sup. Ct.) 57; *Foster v. Morris*, 3 A. K. Mar. (Ky.) 609; *Fletcher v. McFarlane*, 12 Mass. 43; *Allen v. Thayer*, 17 id. 299.

⁷*Shelton v. Carnal*, 16 Ala. 148.

⁸*Page v. Kinsman*, 43 N. H. 328; *Carpenter v. Thompson*, 3 id. 204. If there is no tenancy there is no estoppel. *Hughes v. Clarksville*, 6 Pet. (U. S.) 369; *Foust v. Trice*, 8 Jones (N. C.) L. 290; *Head*, 7, id. 620. As the estoppel began by the making of the lease, so by the determination thereof it ends. *Cuthbertson v. Irving*, ante; 4 Bacon's Abr. Tit. Leases (O.) 191.

⁹*Stoops v. Delain*, 16 Mo. 162; *Longfellow v. Longfellow*, 54 Me. 240. See *contra*, *Carpenter v. Thompson*, ante, where it is held that the estoppel applies only while the term continues. In *Wilson v. James*, 79 N. C. 349, it was held that even where one who at the time of entry was disabled from entering into a contract, entered upon land by permission of one who claimed, and was acknowledged to be the owner, he must return the possession to him, as a condition precedent to denying his title.

self, which may ripen into a title under the statute of limitations; but such hostile claim, his part operates a forfeiture of the lease, at the election of the landlord, who may at once eject him as a trespasser. But when the tenant sets up adverse possession in himself, in defense of an action by the landlord under whom he entered, knowledge of such adverse holding must be brought home to the landlord or notice of collateral facts from which such knowledge will be inferred.¹

¹ Wells v. Sheerer, 78 Ala. 142; in Houston v. Ferris, 71 Ala. 570, it is a well settled rule that a tenant is estopped from disputing his landlord's title so long as he continues in possession of the demised premises; and hence ordinarily, he must surrender the possession of the premises, before he can be heard to set up or assert an outstanding title, adverse to that of his landlord. The plaintiff in an action of unlawful detainer having derived title by purchase from a testator's sole devisee, the defendant having entered under a lease from the plaintiff cannot under the principles above stated defeat a recovery by showing that he had been appointed administrator of the estate of the testator under whom the plaintiff derived title and that the latter owed debts at the time of his death, some of which were still outstanding and unpaid. These facts do not show that the landlord's title had expired or that it had been extinguished, and hence the case does not come within the established exception to the general principle forbidding a tenant from disputing his landlord's title, that the tenant may always show that his landlord's title has expired or been extinguished since the creation of the tenancy. In Elliott v. Dycke, 78 Ala. 150, it was held that the law holds a tenant to very strict allegiance to his landlord, and does not allow him, having entered under his landlord, though only paying the taxes on the land as rent, to throw off his allegiance, and become the tenant of another, unless he shows that other has acquired the title of his former landlord pending his occu-

pancy. In Crim v. Nelues, 78 Ala. 804, the rule which holds a tenant estopped from disputing the title of his landlord, without first surrendering the possession which he has received, is founded on considerations of public policy, and is co-extensive with its requirements and purposes; and it depends on the existence of the legal relation, which can only be created by a valid contract. A conveyance of the homestead by husband and wife, the voluntary signature and assent of the wife not being shown and certified as required by law, is a nullity and has no operation against the husband, by estoppel or otherwise; and a subsequent verbal promise by him to pay rent to the grantee, no surrender or change of possession being shown, is without consideration, and does not create the relation of landlord and tenant between them. If a tenant enters into possession under the lease and afterwards acquires an outstanding title adverse to his landlord he cannot assert it against his landlord, without first surrendering the possession; and *fortiori* where the tenant enters under a lease from an administrator in his official capacity he is estopped from setting up as against the administrator *de bonis non* a subsequent lease from the administrator personally under claim of personal title or title in opposition to the estate, Norwood v. Kirby, 70 Ala. 397. When the tenant enters into possession on the faith of his lease, or being in possession is permitted to remain on recognition of the landlord's title, he is estopped from setting up an outstanding title in defense of an action by his landlord during the continuance of

SEC. 233. **Construction.—Leases by deed.**—Deeds—including leases by deed—being the highest description of private written instruments, are themselves the best evidence of the facts which they contain, the circumstances which they relate, and the makers' intentions. In their construction, regard must be had to all their parts; and general words may be restrained by particular recitals.¹ Where the recitals in a lease stated that a sum of money which was in part to be given for fixtures was part of the consideration for the lease, it was held, that, whether the lessee would or would not be estopped by it, he was not bound to execute such a lease.² If a deed may operate in two ways, the one consistent with the intent of the parties, and the other repugnant to it, the courts will put such a construction on it as to give effect to the intent;³ for deeds must be construed so as to

his estate, *Caldwell v. Smith*, 77 Ala. 157. A tenant cannot extinguish his landlord's title to the demised premises by purchasing a title adverse to his landlord, but he may do so and terminate the lease by purchasing his landlord's title at a voluntary or forced sale. A tenant cannot withhold over due rents or other moneys due the landlord to cover damages from an apprehended eviction by a superior title. The covenant for quiet enjoyment is implied in every mutual contract for leasing land, *Pickett v. Ferguson*, 45 Ark. 177. A tenant can not dispute the title of the landlord under whom he entered, while still holding under him, but must first surrender the possession in good faith; it is not enough that he left the possession for a few days without notice to his landlord, and again resumed it by collusion with another person, *Littleton v. Clayton*, 77 Ala. 571. He cannot collude with and attorn to another to the prejudice of his landlord, *Bryan v. Winburn*, 43 Ark. 28. Nor can he be relieved from the payment of rent and restoration of the premises to his landlord, by buying up the outstanding title from another during his tenancy, *Brown v. Keeler*, 43 Ark. 289. The title or possession

of real estate is not put in issue, in an action to recover rent alleged to be due on a written lease, by an answer denying the plaintiff's title and right of possession, and alleging the title and right of possession to be in some one else, under whom defendant entered and held possession, *Ghiradelli v. Greene*, 56 Cal. 629. In an action of unlawful detainer, it is error to permit the defendant to prove that his signature to the lease was obtained by fraud or mistake, neither of which was set up in the answer. And a party who accepts a lease cannot lawfully refuse to surrender possession of the demised premises at the expiration of the term, on the ground that there was a prior agreement under which the lessee might have held if he had not taken a lease, *McCreary v. Marston*, 56 Cal. 408.

¹ *Palmer v. Hemersham*, 4 M. & S. 423; *Simons v. Johnson*, 3 B. & Ad. 175; *Bain v. Cooper*, 9 M. & W. 701; *Major v. Selisbury*, 2 D. & L. 763, 768; *White v. Osborne*, 4 Jur. O. S. 941.

² *Vonhollen v. Knowles*, 12 M. & W. 602.

³ *Solly v. Forbes*, 4 Moo. 448; *Hotham v. East India Co.*, 1 T. R. 639.

operate according to the intention of the parties, if by law they may; and if they cannot operate in one form, they shall in another.¹ The language of a lease will be construed with reference to the subject matter to which it applies, and in reference to a general or local custom if there is any controlling the matter; and if the words used have acquired a peculiar meaning in the vicinity of the leased premises, such meaning may be shown. Thus, a tenant under a lease bound himself to "cultivate and farm said land in a workmanlike manner; to put out all the crops in good season and in proper order, of such kind of grain and in such field as the landlord should designate; also to take off all the crops in proper season and house the same in proper order." It was held that "workmanlike manner" meant in a "farmer like manner," or as good farmers usually do. The duty of the tenant was not confined to performing the things expressly required by the lease. And in an action by the tenant for work and labor in spreading lime in the fall before he was to take possession under his lease, it was held competent for defendant to show as evidence of what was meant by "workmanlike manner" of cultivation, that good husbandry, and the usual course of managing such farms in that vicinity, required that a tenant about to take possession in the spring, or hold over another year, should prepare the ground in the preceding fall or winter; and should spread on corn ground such lime or other fertilizers as the landlord furnished, without stipulation to that effect in the lease, and without charging the landlord therefor.² Where a material word appears to have been omitted in a lease by mistake, and other words cannot have their proper effect unless it is introduced, the lease must be construed as if that word was inserted, although the particular passage where it ought to stand conveys a sufficiently distinct meaning without it.³ An instrument of demise was produced in evidence, by which

¹ *Edwards v. Bailey*, Cowp. 600; *Shep. Touch.* 81 (sec. 18); ² *Smith* L. C. 412, notes, 4th ed.

³ *Aughinbaugh v. Coppenhaffer*, 55 Penn. St. 347.

³ *Wright v. Dickson*, 1 Dow. 141, 147.

the plaintiff agreed to let for the term of one year fully to be complete and ended ; most of the subsequent stipulations in the lease were wholly inapplicable to a tenancy determinable by a notice to quit ; the document appeared on the face of it to have originally contained words creating a tenancy from year to year, which were struck out, and the above words as to the term only remained ; it was held, that the words struck out might be looked at to show what the intention of the parties was ; that the tenancy was for a single year only ; and that the terms inapplicable to such a tenancy must be considered as expunged or as only applicable in case the tenancy should continue.* General words at the end of a particular specification will not pass any property of a different nature from that particularly mentioned.*

In construing a deed conveying either a fee or a term, the court will not lay too much stress upon the strict and precise meaning of words where the intention is manifest, but will marshal the words, if necessary, so as to give effect to the intention of the parties ;* and it sometimes happens,* that a different meaning will be given to the same words, when they refer to different subject matters, and it is clear that they were used to convey a different sense in reference to one matter, from what they were intended to have in another.* *The end contemplated by the parties will be regarded*, rather than the mode taken to obtain it, and the failure of the latter will not be permitted to involve the failure of the former ;* and if there is an evident intention to pass the land in one way or another, the conveyance may be good either way ;* and if the intention

*Strickland v. Maxwell, 2 C. & M. 539.

*Anon. Lofft. 398; Sandiman v. Breach, 7 B. & C. 96; Hare v. Horton, 5 B. & Ad. 71, 5; Reg v. Nevill, 8 Q. B.; East London Water Works Co. v. Trustees of Mile End Old Town, 17 Q. B. 512; Lyndon v. Stanbridge, 2 H. & N. 51; Huntington v. Havens, 5 John. Ch. (N. Y.) 23.

*Cook v. Gerrard, 1 Wm. Saund. 170; Atto v. Hemmings, Bulst. 282.

*Footh v. Chapman, 1 P. Wms. 667.

*Bell v. Scamman, 15 N. H. 381; Bryan v. Bradley, 16 Conn. 474.

*Bryan v. Bradley, ante; Shep. Touch. 88; WILLES, C. J., in Milbourne v. Simpson, 3 Wils. 22; Wilkinson v. Trammer, 3 id. 75; Barrett v. French, 1 Conn. 354; 3 Inst. 271; Gale v. Coburn, 18 Pick. (Mass.) 397; Crossing v. Sendamore, 1 Mod. 175.

to convey is clear the misuse or misapplication of technical words or terms will not defeat such intention.¹ If an instrument contains two distinct instruments, as a lease and a release, the court will regard that as first which is first in point of time, in order to carry out and give effect to the intention of the parties.² A grammatical error will not be permitted to defeat a deed, the rule being according to the maxim "*mala grammatica non vitiat chartum*," and if necessary to effectuate the clear intention of the parties, the proper word will be supplied or a word will be construed, as though the proper word was used, and under this rule the word "and" has been made as "or."³ In construing a deed, the court will look at the entire instrument, and general words will be restrained by particular recitals,⁴ and an erroneous or false description will not destroy or qualify a former description. Thus, if a lease is made of "all my lands" in a certain town, "containing ten acres," *all* my lands in the town named will pass, whether it embraces more or less than ten acres; agreeably to the maxim "*falsa demonstratio, non nocet*."⁵ If there are particulars enough to indicate *what* land is intended to be conveyed, addition of other inconsistent particulars will be rejected. The rule may be said to be that, where two clauses of a deed are so inconsistent or repugnant with each other that both cannot stand, the first will be enforced and the last rejected,⁶ as, if anything in the habendum is irreconcilable with the premises, that portion of the habendum will be treated as void,⁷ and the granting clause, in case

¹ Lynch v. Livingston, 8 Barb. (N. Y.) 463; Krider v. Lafferty, 1 Whart. (Penn.) 808; Brown v. Manter, 21 N. H. 528.

² Bredan's Case, 1 Coke, 76; Barker v. Keat, 2 Mod. 252.

³ 1 Inst. 225 a; Chapman v. Dalton, Plowd. 289; Hancock v. Watson, 18 Cal. 137; Jackson v. Topping, 1 Wend. (N. Y.) 888.

⁴ Mosely v. Motteux, 10 M. & W. 535; Simons v. Johnson, 3 B. & Ad. 175; Pritchard v. Dodd, 5 id. 689; Payler v. Homersham, 4 M. & S. 682; Swindells v. Beswick, 3 Ad. & El. 873; Huntington v.

Havens, 5 John. Ch. (N. Y.) 28; Moore v. Griffin, 22 Me. 350.

⁵ Shep. Touch. 248; Llewellyn, 11 M. & W. 188; Herrick v. Hopkins, 23 Me. 217.

⁶ Seamen v. Hogeboom, 21 Barb. (N. Y.) 398; Prescott v. Hayes, 43 N. H. 593; Anderson v. Baughman, 7 Mich. 69.

⁷ Havens v. Dale, 18 Cal. 359; Daniel v. Veal, 32 Ga. 589; Gould v. Womack, 2 Ala. 83; Webb v. Webb, 29 id. 588; Doe v. Porter, 3 Ark. 18.

⁸ Eldredge v. See. Yap. Co., 17 Cal. 44.

there is repugnancy, prevails over the introductory statement,¹ and generally, subsequent words of doubtful import will never be construed so as to contradict preceding words that are certain;² and in applying these rules, the court will regard that part of a deed *which ought to take precedence* as being precedent, although such is not its order in the deed.³ But every part of a deed will be give effect to, if it can be done, and there must be a positive repugnancy to warrant the rejection of any part of it.⁴ The language of a deed will be construed most strongly against the party using it, as it is presumed that a person will not use language to his own disadvantage;⁵ and if it is susceptible of either of two constructions, the grantee or lessee may elect which way to take it,⁶ but the party must make his election, and not leave the court to make it for him.⁷

SEC. 234. **Parol evidence inadmissible to vary deeds.**—The general rule with regard to the admission of parol evidence to explain the meaning, or to add to, vary or alter, the express terms of a deed, is, that it shall not be admitted.⁸ Thus, where property has been conveyed by deed, parol evidence of an agreement to apportion the rent of the current quarter, contrary to the terms of the deed, is inadmissible.⁹ So parol evidence is inadmissible to show that a particular piece of land was intended to be included in or to be excluded from the deed.¹⁰

SEC. 235. **Exceptions.**—The exceptions to this rule are—1st, where, although the deed is clearly enough

¹ Webb v. Webb, ante.

² Pitty v. Booth, 19 Ala. 633; but this is not the rule in the construction of wills. Sherritt v. Buckley, 2 My. & K. 149; Doe v. Biggs, 2 Taunt. 109.

³ Doe v. Porter, ante.

⁴ Corbin v. Healey, 20 Pick. (Mass.) 514; Pike v. Monroe, 86 Me. 309; Gibson v. Bogg, 28 Mo. 478.

⁵ Judson v. McMullen, 1 Strobh. (S. C.); Marshall v. Mills, 8 Conn. 369; Carroll v. Norwood, 5 H. & J. (Md.) 163; Adams v. Frothing-

ham, 8 Mass. 352; Bushnell v. Proprietors, &c., 81 Conn. 150; Alton v. Illinois Trans. Co., 12 Ill. 28; Coheco v. Whittier, 10 N. H. 305; Dunn v. English, 23 N. J. L. 126; Mills v. Catlin, 22 Vt. 98; Hogg's Appeal, 22 Penn. St. 479.

⁶ Jackson v. Hudson, 8 John. (N. Y.) 375; Shep. Touch. 83.

⁷ Miller v. Green, 8 Bing. 92.

⁸ Ros. Ev. 14 (11th ed.).

⁹ Flinn v. Calow, 1 M. & G. 539.

¹⁰ Meres v. Ansell, 3 Wils. 275; Hope v. Atkins, 1 Price, 143; Doe d. Norton v. Webster, 12 Ad. &

expressed, some ambiguity arises from extrinsic circumstances; 2, where the language of a charter or deed has become obscure, and the construction doubtful from antiquity; 3, where the grant appears uncertain, owing to a want of acquaintance with the grantor's estate; 4, where it is important to show a different consideration consistent with but not repugnant to that stated in the deed, itself; 5, where it becomes necessary to show a different time of delivery from that at which the deed purports to have been made; 6, where it is sought to prove a customary right not expressed in the deed, but which is not inconsistent with any of its stipulations; 7, where fraud or illegality in the formation of the deed is relied on to avoid it. If a clause in a deed is so ambiguously or defectively expressed, that a court of justice cannot, even by reference to the context, collect the meaning of the parties, it will be void.¹

Where a written lease is silent as to fixtures, but provides that the lessee shall make all improvements and repairs; it may be shown that the lessor, for an independent consideration, agreed that certain fixtures then in the building should remain for the lessee's use. Thus, in a New York case,² it appeared that on the 31st of

EL. 442; *Barton v. Dawes*, 10 C. B. 261.

¹ *Woodfall's L. & T.* 90.

² *Lewis v. Seabury*, 74 N. Y. 409; 30 Am. Rep. 811. In *Naumburg v. Young*,⁴⁴ N. J. L. 331, it was held that upon a written lease of a factory with its fixtures and machinery, there is no implied warranty that the machinery is in good repair or of sufficient capacity for the work for which the premises are designed; and that oral testimony was inadmissible to prove that the landlord, during the negotiations, guaranteed that the engine and boiler were in thorough repair and would furnish sufficient power for the business. After laying down the general rule of the inadmissibility of parol evidence to add to or alter the terms of a written contract, and specifying the chief exceptions, namely, a distinct and collateral parol agreement, *Lindley*

v. Lacey, 17 C. B. (N. S.) 578, and a written agreement conditioned on an unperformed oral agreement, *Pym v. Campbell*, 6 E. & B. 370; *Wallis v. Littell*, 11 C. B. (N. S.) 369; *DUPRE, J.*, said: "Three recent English cases have carried the doctrine of the admissibility of parol evidence where there is a written agreement between the parties, to an extreme length. *Morgan v. Griffith*, L. R., 6 Exchq. 70; *Erskine v. Adeane*, L. R., 8 Ch. App. 756; *Mann v. Nunn*, 48 L. J., C. P. (N. S.) 241. *Morgan v. Griffith* and *Erskine v. Adeane* are almost identical in their facts. A farmer in treaty for grass lands declined to take them, on the ground that the property was overrun with rabbits. The lease, as prepared in writing, reserved to the lessor the right to kill game. The lessee refused to execute it until the lessor promised to kill down the game. The rabbits not having

March, 1875, the defendant leased to the plaintiff certain

been destroyed, the tenant sued the landlord for the damage done by them to the grass and crops; and evidence by parol of the landlord's undertaking to keep down the game was admitted. *Morgan v. Griffith* was decided upon little consideration. The ground of decision was that the verbal agreement was collateral to the lease, and did not affect the mode of enjoyment of the land demised. *Erskine v. Adeane* was decided by two equity judges on the authority of *Morgan v. Griffith*, reversing the decision of LORD ROMILLY, M. R., who had excluded the evidence, for the reason that the alleged agreement was not a distinct agreement, but an alteration of the original terms of agreement, and to be binding, should have been inserted in the lease. *Morgan v. Griffith* was approved in *Angell v. Duke*, L. R., 10 Q. B. 174; but it is apparent from the report of the latter case that the approbation expressed had reference only to the fact that such an agreement was not within the Statute of Frauds; for *Angell v. Duke*, on that occasion, was argued on demurrer, and the only point of demurrer was that the agreement in question was for an interest in lands within the Statute of Frauds, and it appearing on the face of the pleading that the landlord's agreement sued on—to put the house in repair and send more furniture into it—was antecedent to and collateral to the contract of letting, the declaration was sustained. But at the trial oral testimony was tendered of the alleged promise in the course of a treaty for the lease, and the lease containing a demise of the house and the furniture in it, comprised in a schedule annexed, BLACKBURN, J., rejected the testimony, and held that the lease was conclusive as to all that referred to the taking of the house and furniture, and his ruling was sustained by the court *in banc*. *Angell v. Duke*, 32 L. T. (N. S.) 320; 23 W. Rep. 548. In *Mann v. Nunn* the defendant let a messuage in an unfinished state, by a written agreement. Before and at the time of signing the agreement, he

verbally promised to put the premises in a condition fit for habitation—mentioning, among other things, a new water-closet. He failed to put in the closet, and oral testimony of his promise was held to be competent in an action by the tenant for damages. The landlord's promise possibly may be considered to relate to what CHIEF JUSTICE ERLE, in *Lindley v. Lacey*, calls a preliminary matter to be done at once, before the lease should take effect. *Mann v. Nunn* was doubted by BLACKBURN, J., in *Angell v. Duke*, 32 L. T. 320, and if the landlord's promise be regarded as in the nature of a covenant to repair, is contrary to that line of cases which hold that such an undertaking cannot be established by parol if the premises are let by a lease in writing." After reviewing the application of the general rule to a number of related cases, the court continued: "In the present case the lease is perfect and complete in all its parts. On its face it purports to express the terms of the letting as finally agreed upon. The effort is to engraft, by parol evidence, a contract of warranty upon a contract in writing, which appears to be complete and perfect, and is silent on that subject. Oral testimony cannot be admitted for this purpose without breaking down the rule which permits parties to make their written contracts the only evidence of their undertakings, and enables them to protect themselves from the hazard of uncertain oral testimony with respect to their engagements. Where the lease contains no warranty of the condition of the premises, declarations of the lessor on that subject are not admissible to create a warranty; such proof would be adding to the written agreement by parol evidence. *Dutton v. Gerrish*, 9 Cush. (Mass.) 89, and *Brigham v. Rogers*, 17 Mass. 571, are directly in point. In the first of these cases parol evidence of a warranty of the condition of the premises demised—there being a written lease—was excluded; and in the second it was held, that where an estate was demised by lease under

premises in the city of Brooklyn, described in the lease,

seal, no action lay on a parol promise made by the lessor at the time of executing the lease, that the water on the premises demised would be good and that there would be enough of it, and if not he would make it so. Nor will a warranty, such as has been sued on, be implied from the contract of letting. The general doctrine of the law is, that upon a demise there is no implied contract that the property is fit for the use for which the lessee requires it, whether for habitation, occupation or cultivation. *Sutton v. Temple*, 12 M. & W. 52; *Hart v. Windsor*, id. 68; *Erskine v. Adeane*, L. R., 8 Ch. App. 756; *Clives v. Willoughby*, 7 Hill (N. Y.) 83; *Dutton v. Gerrish*, 9 Cush. (Mass.) 89; *Foster v. Peyser*, id. 242; *Wood on Land. & Ten.*, § 382. There is no implied duty on the owner of a house which is in a ruinous and unsafe condition to inform a proposed tenant that it is unfit for habitation, and no action will lie against him for an omission to do so in the absence of express warranty or deceit. *Keates v. Earl of Cadogan*, 10 C. B. 591. An obligation on the part of the landlord will not be implied that he shall make substantial repairs because of the premises being in a dangerous condition. *Gott v. Gandy*, 2 E. & B. 845. The doctrine with respect to covenants implied from the letting has been held in great strictness in this State. A covenant on the part of the lessor, even for title, will not arise from the relation of landlord and tenant; there must be either an express agreement to that effect, or words must be used from which such an agreement can be implied. *Gano v. Vanderveer*, 81 N. J. L. 298. *Smith v. Marrable*, 11 M. & W. 5, contains the only exception to the general rule that from the letting no implied undertaking will arise that the premises are fit for or adapted to the purposes for which they were let. There a furnished house was let to a tenant for a short term—five or six weeks. It was found to be infested with bugs and unfit for habitation. The tenant quit for that

reason, and set up these facts as a defense to an action for use and occupation, and his defense was allowed by the court. This case was explained and distinguished by LORD ABINGER in *Sutton v. Temple*, 12 M. & W. 52, as resting on exceptional grounds. It was greatly shaken by *Hart v. Windsor*, 12 M. & W. 68, but has since been followed in the English courts as an exceptional case in *Wilson v. Finch*, L. R., 2 Exchq. Div. 386, where the court, following *Smith v. Marrable*, held that a family taking a lease of a furnished house might refuse to occupy it, and defend an action for rent, if the house, owing to the defective drainage, was unfit for habitation. The reasoning on which these cases were decided was subjected by BRAMHALL, L. J., in *Robertson v. Amazon Tug and Lighterage Co.*, 46 L. T. (N. S.) 146, to a criticism bordering on ridicule. *Smith v. Marrable* was distinguished by PARKE, B., in *Sutton v. Temple*, 12 M. & W. 65, on the ground that the contract was of a mixed nature, being for a house and furniture; and in *Cleves v. Willoughby*, 7 Hill (N. Y.), 86, the case was likened to a sale of provisions for domestic use, on which the law will imply a contract that they are wholesome and fit for use. Certain it is that *Smith v. Marrable* has never been followed, except under the precise circumstances on which it was decided, and then only as enabling the tenant to abandon the premises, rescind the lease, and defend against the payment of rent. The case has never been cited to raise an implied warranty under any other circumstances without disapproval. The distinction between such a condition of the premises as will justify the refusal of the tenant to enter and occupy, and a warranty which will subject the lessor to an action for damages, is referred to by COTTON, L. J., in *Robertson v. Amazon Tug and Lighterage Co.*, ante." In the absence of fraud or express agreement, the lessor is not liable to the tenant or others for the condition of the premises, nor does he undertake that they are tenant-

for three years from the first of May then next. That at the time the lease was executed, the premises were in good order, with gas fixtures, shelving, and other fixtures suitable and ready for immediate use in the business of a bakery, and the defendant represented to the plaintiff, that these were appurtenant and belonged to the premises. That at the commencement of the term, the shelving and fixtures had been removed with the knowledge of the defendant and without the consent of the plaintiff, and the premises were in bad condition. That the defendant promised the plaintiff to replace these things and refit the premises, and the plaintiff entered into possession upon the faith of this promise, but the defendant neglected to replace or refit, and the plaintiff was compelled to, and did at the request of the defendant, replace some portion, and expended the sum of \$100, which the defendant has not repaid and for which he remains indebted to the plaintiff, "to the damage of the plaintiff of the sum of \$100."

It was proved that certain fixtures, in the place at the time of the execution of the lease, had been originally bought by the plaintiff, when previously occupying the bakery, from one Immerschitt, an earlier tenant; that she had sold them, with the good-will of her term, to Lippincott, when he came in after her; and that Lippincott took them off when he left the premises, claiming under the bill of sale from her. The plaintiff also gave evidence tending to show—that when negotiating with the defendant for the present lease, she objected that the fixtures belonged to Lippincott, by his previous purchase from herself, and that perhaps he would take them away; that the defendant replied, that they were annexed to the premises and belonged to him, and she had no right to

able for the purposes for which they are apparently intended. *Jaffe v. Harteau*, 56 N. Y. 398; 15 Am. Rep. 438. In this case the defect was the lack of a safety-valve to a boiler. But fraud will be imputed where the landlord lets premises for habitation, knowing them to be infected by a conta-

gious disease, without notifying the tenant, and he will be held liable in damages to the tenant attacked by such disease. *Cesar v. Karutz*, 60 N. Y. 220; 19 Am. Rep. 164; *Minor v. Sharon*, 112 Mass. 477; 17 Am. Rep. 122, and note, 127; *Eaton v. Winne*, 20 Mich. 156; 4 Am. Rep. 377.

sell them to Lippincott or the earlier tenant to sell them to her, and that Lippincott should not move them, and he would see that all would be right; that for this promise, together with the sale of the good-will, she paid the defendant a consideration entirely aside from the rent or anything stipulated in the lease to be paid by her; that after Lippincott had removed the fixtures, the defendant again told the plaintiff, before she entered into possession, not to go near the place, and that he would see everything would be right for her; and that subsequently, after she had gone into possession and had expended about \$150 in repairing and putting in fixtures, upon his demand of the rent and her refusal at first to pay it, he again said he would make everything right.

HAND J. said: "The lease was in writing and contained no stipulation of the defendant as to fixtures, but a clause that the plaintiff should make all "improvements and repairs" necessary to be made on the premises *during the continuance of her term*, and that she should at the end of the term leave on the premises all the repairs and improvements, that may have been made or put on the same. It is insisted by the defendant that this writing is conclusive of the contract and precludes any evidence of the oral agreement as to fixtures.

The case is undoubtedly very near the line, but I am inclined to think that such parol agreement was a separate and independent one, touching a subject not covered by the lease, and made for an independent consideration paid by the plaintiff, not stipulated for or referred to in the lease. The promise that certain specific fixtures then on the premises should be retained and remain there, so that the plaintiff might enjoy the benefit of them, if she took the lease, may be sustained as a previous distinct collateral agreement upon a collateral and independent consideration, which did not merge in the subsequent written contract of hiring. See *Ersine v. Adeane*, L. R. 8 Ch. App. 756; *Hope v. Balen*, 58 N. Y. 380. The case is distinguishable from such cases as *Johnson v. Oppenheim*, 55 N. Y. 280, where the parol agreement necessarily affected the premises themselves, and if admitted

would have varied the terms of the instrument as to the identical property leased.

It is insisted, however, by the defendant that there is no proof but that the fixtures were so annexed to the building as to belong to the defendant as he claimed, and consequently that he did give good title to the plaintiff, and she could have recovered them from Lippincott or restrained him from removing them. But on the trial, the defendant distinctly disclaimed, on oath, being the owner or having any claim upon the things removed by Lippincott, and stated he presumed Lippincott to be the owner.

On the whole, therefore, I am led to the conclusion that the evidence did authorize the jury to find that there was a breach of a valid contract by the defendant and a cause of action arising thereon. It is not necessary to decide that the amount expended by the plaintiff in putting in the new fixtures, which she afterward sold to Colwell with the lease, furnishes any measure of the damages she is entitled to recover for the breach of this contract of the defendant.

An administrator having under the statute the power to rent the lands of his intestate, this power and the duty to rent resulting therefrom authorize him to make such repairs as are necessary to render the lands tenantable; and if even in the absence of such power an administrator should stipulate with the tenant for making repairs, he could not avoid the stipulation, and whoever claimed its enforcement would take it *cum onere*.

In an action against a tenant for the recovery of rent, if he is entitled to damages in consequence of the failure of the landlord to repair according to a covenant in the lease, or in an agreement made at the time of the contract of renting he may recoup for damages by way of reducing or extinguishing the rent.

If a statute does not intervene, contracts may be expressed partly in writing and partly in parol; and if the writing does not purport to set out the entire contract, but only the part thereof which is obligatory on the party making it, parol evidence is admissible to establish

a distinct and separable part of the contract, obligatory on the other party, but not reduced to writing.¹

Hence, where only the promise of a tenant to pay rent is reduced to writing, parol evidence is admissible to establish a distinct and separable contract on the part of the landlord to repair, made contemporaneously with the writing.

When a landlord stipulates to make repairs and fails to do so, it is not the duty of the tenant to cause the repairs to be made, limiting his recovery to the expenses thereby incurred; but he has the right to rely upon the landlord's promise to make them, and for a breach of the promise the landlord is liable for such damages as are the natural and proximate result.²

¹ Evans v. Bell, 20 Ala. 502
overruled on this point.

² Vandergrift v. Abbott, 75 Ala.
487.

CHAPTER XXVI.

EASEMENTS.

- SEC. 236. Easements—Generally.
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SEC. 236. **Easements—Generally.**—It may be said that all easements that belong to the premises demised pass with the lease, unless expressly reserved, and the tenant also takes the estate subject to all such easements as are imposed upon it, and upon the one hand takes the same rights, and on the other hand is subject to the same duties, in respect of such easements, as the landlord himself. Among these easements or servitudes are rights of way, of commons, fisheries, watercourses, drains, right of support, and many others that are not important to enumerate. It may not be out of place briefly to define the nature of these easements, and the rights and liabilities imposed thereby.

SEC. 237. **Right of way.**—A way is an incorporeal hereditament, and arises either from grant, presumption or necessity. It is right of passage acquired over another's land. It is either *in gross* or *appendant* to land. A way *in gross* is a way that is attached to the person, or appurtenant to land;¹ and a way *appendant* is a way that is incident to the estate of the person claiming it and has a terminus thereon. A way *in gross*, being personal, cannot be transferred,² but a way *appendant* is an incident of the estate and passes as an appurtenance by grant.³ A right of way *appendant* to an estate can be used only for purposes connected with that estate, and a right of way *in gross* can be enjoyed only by the person in whom it exists.⁴

SEC. 238. **By grant.**—Rights of way by grant must be used in accordance with the terms of the grant, and are

¹ Garrison v. Rudd, 19 Ill. 558; Wood on Nuisances, 159-165.

² Washburn on Easements, 232; Alley v. Carlton, 29 Texas, 77.

³ Thorpe v. Brumfit, 8 L. R. (Eq. Ca.) 650.

⁴ Ackroyd v. Smith, 10 C. B. 164.

subject to all the restrictions therein imposed.' The way granted may be inclosed by the owner of the land with gates or bars unless it is expressed to be an open way, or unless such inclosure is inconsistent with the purposes for which it was granted.' But if the way had been laid out before the grant, it will pass in the condition it was when conveyed, and if it was then open the grantor would have no right to set up gates or bars at its entrance.' Unless restricted by the terms of the grant the owner of the land may do any act that does not impair the right of passage over the way granted, or interfere with its free use by the person to whom the right is granted. '

SEC. 239. *Prescription, necessity, &c.*—A way by prescription is a right of passage over another's land, acquired by adverse user for the statutory period, and presupposes a grant.' Ways of necessity can never exist except over one of two parcels of land of which the grantor was the owner when the land in favor of which the way exists was granted, and arises only when the land granted is wholly surrounded by the land of others, and no other access exists.' It is appurtenant to the land and passes by grant; ' mere convenience or inconvenience does not

¹ Garraty v. Daffy, 7 R. I. 476.

² Garland v. Furber, 47 N. H. 304; Hoopes v. Alderson, 22 Iowa, 162.

³ Welsh v. Wilcox, 101 Mass. 163.

⁴ Schwarzer v. Boylston Market, 99 Mass. 285; Bakeman v. Talbut, 31 N. Y. 366; Bean v. Coleman, 44 N. H. 539.

⁵ Dirrickson v. Springer, 5 Harrington (Mich.) 21.

⁶ White v. Seeson, 5 H. & N. 53; Tracy v. Atherton, 35 Vt. 52; Marshall v. Trumbull, 28 Conn. 183; Trask v. Patterson, 29 Me. 499.

⁷ Wissler v. Hershey, 23 Penn. St. 333. "*All ways and rights of way, occupied and enjoyed, or reputed as appurtenant.*"—Defendant was owner in fee of a dwelling-house, together with a cottage and stable belonging to it, called "Roseville," and was also owner in fee of an adjoining farmstead and farm, having a private road which led from a high road to the farm

buildings, and passed close to one side of the stable of Roseville. By indenture of the 1st of May, 1860, defendant demised Roseville to H. for ten years. H. entered on the premises, and built over the stable a hay-loft, with two openings toward the private farm road, having first obtained permission from defendant to do so, and also permission from defendant and the then tenant of the farm to use the farm road for the purpose of bringing hay, straw, &c., to the loft, that being the only access to the openings in the loft. H. and the sub-tenants occupying Roseville continued during the term to use the road up to May, 1870; at that time plaintiff agreeing to purchase Roseville of defendant; and by deed of the 2d of August, 1870, Roseville, &c., was conveyed by defendant to plaintiff in fee, "together with all * * * ways and rights of way, * * * easements

determine the right to such a way.¹ There must an *actual necessity* exist or the right is not created,² and the right ceases when the necessity therefor ceases.³

SEC. 240. *Duties of those using.*—As has been previously stated, when a right of way has been acquired by grant, it must be used according to the terms of the grant,⁴ and, when a right has been acquired by prescription, the right will be commensurate with, and measured by, the use.⁵

The owner of the land is subject to the restriction that he must do no act upon the land adjoining the way that impairs its usefulness or interferes with the passage over it,⁶ but he may make any reasonable or ordinary use of the adjacent land, provided he does not thereby obstruct the passage over it.⁷ He may sink drains or watercourses beneath it,⁸ he may dig cellars beside it, erect buildings on its borders, with doors opening on to it, if in a city or town,⁹ or with blinds and shutters opening over it,¹⁰ and, unless it is a way by prescription, or he is restricted by his grant, he may build over it,¹¹ or may close it up with bars or gates.¹² The title to the soil is in the owner of the land, and he may maintain trespass against persons using it without

and appurtenances to the said dwelling-house, cottage, and hereditaments, or any of them appertaining or with the same or any of them now or heretofore demised, occupied, or enjoyed or reputed as part or parcel of them, or any of them, or appurtenant thereto. *Held*, that the right to use the farm road for the aforesaid purposes passed to the plaintiff under the above words. *Langley v. Hammond*, L. R., 8 Ex. 161, discussed; *Kay v. Oxley*, L. R. 10 Q. B. 360.

¹ *McDonald v. Lindhall*, 3 Rawle (Penn.) 492.

² *Hyde v. Jamaica*, 27 Vt. 460; *Leonard v. Leonard*, 2 Allen (Mass.) 543.

³ *Abbot v. Stewartson*, 47 N. H. 280; *Staple v. Heydon*, 6 Mod. 1; *Holmes v. Seeley*, 19 Wend. (N. Y.) 507; *Scriven v. Gregorie*, 8 Rich. Law (S. C.) 158; *Gayetty v. Bethune*, 14 Mass. 49; *Alley v.*

Carlton, 29 Texas, 78; *Lawton v. Rivers*, 2 McCord (S. C.) 445; *N. Y. Life Ins. & Tr. Co. v. Milnor*, 1 Barb. (N. Y.) 353; *Collins v. Prentice*, 15 Conn. 39.

⁴ *Kirkham v. Sharp*, 1 Whart. (Penn.) 323.

⁵ *Reignolds v. Edwards*, Willes, 282; *Smith v. Wiggins*, 52 N. H. 112.

⁶ *O'Linda v. Lathrop*, 21 Pick. (Mass.) 292.

⁷ *Underwood v. Carney*, 1 Cush. (Mass.) 292.

⁸ *Tillmes v. Marsh*, 67 Penn. St. 507; *Pomeroy v. Mills*, 3 Vt. 279.

⁹ *Underwood v. Carney*, 1 Cush. (Mass.) 292.

¹⁰ *O'Linda v. Lathrop*, 21 Pick. (Mass.) 292.

¹¹ *Schowerer v. Boylston Market*, 99 Mass. 285.

¹² *Bakeman v. Talbot*, 31 N. Y. 366; *Hudson v. Young*, 4 Lana. (N. Y. S. C.) 63.

right,¹ or ejectment against those making erections upon or over it.² But any act of the landowner, that obstructs or hinders the right of the person in whom the easement is vested, or interferes with any rights that he has acquired as incident to his right of way, is a nuisance, and actionable as such. Thus, if he digs a drain under the way, he is bound to close it up securely, and if he fails to do so, whereby the way is injured, or whereby the owner of the way is damaged, either in his property or person, he is liable for all the damages that ensue.³ So, if he makes insecure erections upon the way that damage the person in whom the right is vested, or if he makes openings near thereto and does not securely guard them,⁴ or if he closes up the way or in any manner hinders or obstructs the right of passage over it, he is guilty of a nuisance and chargeable with all the consequences.⁵

SEC. 241. Who must repair.—The grantee of a way, or the proprietor of a way by necessity or prescription, is bound to keep it in repair, and the landowner is chargeable with no duty or liability in that respect.⁶ When the track is fixed by user the right exists in that track, and even though the track becomes impassable, or is obstructed by the owner of the land, the person in whom the easement exists cannot deviate from the old track upon other lands of the person over whose lands the right exists.⁷ But, if the landowner places obstructions in the way, the owner of the right of way may remove them.⁸ If the owner of the land, or any other person, builds over the way so as to darken it or to obstruct it, or in anywise render it less convenient, he is liable as for a nuisance.⁹ Thus, where the plaintiff had a right of

¹ *Hollenbeck v. Rowley*, 8 Allen (Mass.) 476.

² *Codman v. Evans*, 5 Allen (Mass.) 808.

³ *Perley v. Chandler*, 6 Mass. 454.

⁴ *Corby v. Hill*, 4 C. B. (N. S.) 556; *Gallagher v. Humphrey*, 10 W. R. 664; *Shadwell v. Hutchinson*, 4 C. & P. 323.

⁵ *Kent v. Judkins*, 53 Me. 162; *Batishill v. Reed*, 18 C. B. 696.

⁶ *Wynkoop v. Burger*, 12 Johns. (N. Y.) 222; *Walker v. Pierce*, 38 Vt. 95.

⁷ *Williams v. Safford*, 7 Barb. (N. Y. S. C.) 309; *Boyce v. Brown*, id. 80.

⁸ *Boyce v. Brown*, *supra*.

⁹ *Richardson v. Pond*, 15 Gray (Mass.) 387.

way over the lands of the defendant, for hauling merchandise to his store, and had hoisting apparatus arranged for taking the goods into the store, it was held that the defendant was liable for all damages that resulted from the erection of a building over the way, that cut off these facilities, as the plaintiff was entitled to the use of the way for all the purposes for which he had used it for a period sufficient to acquire a prescriptive right.¹

SEC. 242. *Public may acquire right.*—The public may acquire a prescriptive right to use a way as well as a single individual,² and where a private way is opened, leading from a public street, and prepared for use the same as a public street, and with nothing to show that it is not such, although it is closed at one end, the public may use the way, and are bound only to the exercise of the same care as in the use of a public street.³

SEC. 243. *Who liable for obstruction of.*—Where a right of way is vested in several persons, for the benefit of several tenements, neither of the persons in whom the right exists has a right to more than a reasonable use of the way, and any obstruction thereof by one to the detriment of the others, is a nuisance, and actionable.⁴ If the acts of several persons together, though not done jointly or in concert, operate as a nuisance to a way, when the acts of either alone would not operate as an appreciable injury, an action may be maintained in equity against all of them in favor of one who is injured by the aggregation of their acts. In a recent English case,⁵ it appeared that A and B were, in 1853, the owners of the Commercial Inn, at Bradford, and certain lands and buildings adjoining. In the rear of the inn was a yard, occupied with it. The only access to the stable and yard for horses and carriages was from a street, called the *Tyrells*, along a passage, which was upon part

¹ Richardson v. Pond, 15 Gray (Mass.) 387.

² Richardson v. Pond, 15 Gray (Mass.) 387.

³ Danforth v. Durell, 8 Allen (Mass.) 242.

⁴ Thorpe v. Brumfitt, 8 L. R. (Eq. Ca.) 650.

of the land also belonging to A and B. The passage ran northerly from the yard to the street. In July, 1853, A and B sold and conveyed the buildings and land adjoining the *Tyrells* to one John Morrell, reserving the way to the inn yard. Subsequently to the sale to Morrell the parties agreed to a change in the boundary between their lands, and a new passage was substituted to the inn yard in place of the old one, which was properly conveyed to A and B by Morrell, and by the terms of which Morrell was to construct the new way and keep it in proper repair. It was also provided that Morrell might erect buildings over the passage-way, so that it was left at least eight feet high. Morrell also reserved a right of way over the passage for the benefit of his premises, and the right to grant a right of way over the same to others. The new way was constructed and Morrell erected warehouses on the land purchased by him, and also made in the floor-way of the new passage a large opening forming the entrance to a cellar beneath, and covered it with a wooden trap-door. He also made a trap-door over it, forming an entrance through the roof covering the passage-way into the warehouse above. He also made side entrances into the warehouses and placed folding doors in them, for the purpose of loading and unloading goods from the passage-way. He let these premises to different parties in 1863, and he was never after that time in the occupation of them. The tenants occupying distinct portions of the premises caused the road-way to be blocked up with carts and wagons, and kept the trap-door and folding-doors open, and the crane used for hoisting goods at work for long and unreasonable periods during the busiest hours of the day, when great numbers of persons with vehicles and on foot required to pass to the inn yard. The court held that the obstruction of the way by teams and otherwise, in the loading and unloading of goods upon the passage-way, was a nuisance to the plaintiff, for which the defendants were liable to him. LORD JUSTICE JAMES, among other things, said: "The plaintiff only claims a right of way. He does not claim to be entitled to the soil or to prevent the owner

of the soil from exercising over it any rights which do not derogate from his grant. The plaintiff cannot complain unless he can prove an obstruction which injures him. The case is not like one of trespass in which a recovery can be had if no damage is proved. Nothing can be much more injurious to the owner of an inn than that the way to his yard should be constantly obstructed by the loading and unloading of heavy wagons. It is said that the plaintiff alleges an obstruction caused by several persons, acting independently of each other, and does not show what share each had in causing it. It is probably impossible for a person in the plaintiff's position to show this. Nor do I think it necessary that he should show it. The amount of obstruction caused by any one of them might not, if it stood alone, give ground for any complaint, though the amount caused by all of them may be a serious injury. Suppose one person leaves a wheelbarrow standing on a way. That may not cause any appreciable inconvenience, but if a hundred do so, that may cause a serious inconvenience, which a person entitled to the use of the way has a right to prevent; and it is no defence to any one among the hundred to say, that what he does of itself causes no damage to the complainant."

SEC. 244. *Right of common.*—Common, as a legal term, signifies a right or liberty to take or use some part or portion of that which another person's lands, woods, waters, &c., naturally produce, without having any property in the soil,¹ and embraces, among others, common of pasture, of turbary, estovers and piscary. A common of pasture is a right or liberty which one or more persons may have to feed their cattle on another's lands, and is generally restricted to commonable cattle: that is, such as plow and manure the lands, such as horses, oxen, cows and sheep, and seldom extends to other animals, as

¹ Bacon's Abr. Tit. Commons; Tudor's Leading Cases, Real Property, 108; Woodfall's L. & T. 602. Common is a right, or privilege,

which several persons have to the produce of the lands or waters of another. Van Rensselaer v. Radcliff, 10 Wend. (N. Y.) 689.

goats, swine, geese, and the like.¹ The number is usually restricted either by an express limitation as to the number, or by those only being allowed to depasture which are levant and nonchant upon the land, in respect of which the right of common is claimed. That is, such cattle as the winter eatage of the lands, together with the produce of it in summer and the food obtained from the common, is capable of maintaining.² It cannot be claimed by prescription for a house without any land,³ nor can it exist without limitation, as appurtenant to an ancient house, without land,⁴ but it may exist as an appurtenant to land without a house.⁵ A limitation as to the time of the year in which the rights shall be exercised is sometimes imposed, but as to whether any or what restrictions are imposed depends upon the terms of the grant, or the extent of the users. Common of pasture is either appendant, appurtenant, in gross, or *pur cause de vicinage*; but in pleading, it is not necessary to allege whether it is of one class or another.⁶ A common appendant is purely a common law right, and must have existed from time immemorial,⁷ and belongs only to arable lands, for commonable cattle, levant and couchant,⁸ and only for so many of the tenant's cattle as are necessary to manure the tenant's arable land,⁹ and does not extend to the waste.¹⁰ Common of pasture appurtenant is a right or liberty of pasturing cattle on another's land, and is not confined either to arable land or commonable cattle, and may be claimed by modern grant¹¹ or by prescription;¹² but this right extends only to the party's own cattle, levant and couchant on his land.¹³ A right of com-

¹ Tudor's Leading Cases of Real Property, 109.

² Carr v. Lambert, 3 H. & C. 499; Whitlock v. Hutchinson, 2 M. & R. 205.

³ Scholes v. Hargreaves, 5 T. R. 46.

⁴ Benson v. Chester, 8 T. R. 596.
⁵ Ricketts v. Salway, 2 B. & Ald. 360.

⁶ Petersdorff's Abr. 144.

⁷ Tudor's Leading Cases, Real Prop. 109.

⁸ Bacon's Abr. Tit. Commons (H) 1.

⁹ Tyringham's Case, 4 Coke, 36 a; Benson v. Chester, 8 T. R. 596; Bennett v. Reeve, Willes, 227; Cheesman v. Hardham, 1 B. & Ald. 711.

¹⁰ Dunraven v. Llewellyn, 15 Q. B. 791.

¹¹ Tyringham's Case, ante; Co. Litt. 122 a; Cowlan v. Slack, 18 East, 108.

¹² Co. Litt. 122 a.

¹³ Benson v. Chester, ante; 3 Wm. Saund. 346, n. 1.

mon of pasture in gross is a right to pasture cattle upon another's land, although the person in whose favor it exists does not own or occupy any other land. Such a right is created by deed, and may be conveyed to a man and his heirs or only for life.¹ Common appendant or appurtenant for cattle levant or couchant cannot be converted into common in gross, because they cannot be severed from the land to which they are annexed without being extinguished; but a common appurtenant for a certain number of cattle may be, because it has no connection of tenure.² Common *pur cause de vicinage* is a liberty that the tenants of one landlord in one town have to enjoy a common of pasture with the tenants of another landlord in another town.³ It can only be claimed by grant, or by prescription from time immemorial, or by user for sixty or thirty years under 2 & 3 Will. 4, c. 71, but not by custom.⁴ This is not properly a right of common, but rather an excuse for a trespass, and at most but a permissive right, which was originally allowed for the prevention of suits in neighborhoods where a boundary could not easily be established.⁵ It exists where the tenants of two lords have used, time out of mind, to have common promiscuously in both lordships, lying together and open to one another;⁶ it is therefore necessary that these adjoining lands should both be commonable.⁷ It seems that common *pur cause de vicinage* may also exist between the proprietors of neighboring lands, though there are no commons on either side;⁸ and the lord of a manor may have, in respect of the waste or common land in his own manor, a right to turn his own cattle upon the common of an adjoining manor.⁹ Those who claim common *pur cause de vicinage* may not put their cattle on such common,

¹ Tudor's Leading Cases, Real Property, 111.

² Bunn v. Channer, 5 Taunt. 244.

³ Jones v. Robin, 10 Q. B. 620.

⁴ Jones v. Robin, 10 Q. B. 581, 620; Clarke v. Tinker, id. 604; Prichard v. Powell, id. 589, 608; Tudor L. C. Real Prop. 118.

⁵ Co. Litt. 122 a; Willes, R. 322;

Bac. Abr. tit. Common (A) 4; Tudor L. C. Real Prop. 112.

⁶ 8 Coke R. 78.

⁷ Heath v. Elliott, 4 Bing. N. C. 388.

⁸ Jones v. Robin, 10 Q. B. 581, 620.

⁹ Earl of Sefton v. Court, 5 B. & C. 917.

for then they are distrainable, but should turn them into their own fields, and leave them to stray into the neighboring common.¹ Every common *pur cause de vicinage* is a common appendant.² Where one of two adjoining commons, with common of vicinage, was inclosed and fenced off by the owner of the soil, leaving open only a passage sufficient for the highway which led over the one to the other; yet as the separation was not complete, so as to prevent the cattle straying from one to the other by means of the highway, it was held, that the common by vicinage still continued.³ Where the plaintiff, being possessed of a house and land in G, had for sixty years exercised rights of common in W, but it appears that this was done near the boundary of the two commons of E and W, which lay open and uninclosed adjacent to each other: and it also appeared that the parties exercising the right did not at the time know the exact boundaries, and the plaintiff had on a previous inclosure of the common of E obtained an allotment there in right of his estate; it was held that the judge was right in leaving it to the jury to say whether the evidence was referable to an exercise of the right in E and a mistake in the boundary, or to an exercise of the right in W.⁴ In this country, rights of common may be said to be obsolete, especially in the Northern and Western States. In New York the right is recognized;⁵ also in Illinois, where there are lands granted as commons to towns, hamlets and villages that are always to remain so.⁶ In Missouri as well as in New York it is held that the right may be lost by adverse user.⁷

SEC. 245. *Inter-commoning*.—There is frequently a mutual right of inter-commoning between the owners of the

¹ *Termes de Ley*, 146; *Bac. Abr. Tit. Common (A)* 4.

² *Danv. Abr.* 799.

³ *Gullett v. Lopes, Bart.*, 13 *East*, 348.

⁴ *Hetherington v. Vane*, 4 *B. & Ald.* 428.

⁵ *Livingston v. Ten Broeck*, 16 *John. (N. Y.)* 26; *Watts v. Coffin*,

11 *id.* 465; *Smith v. Floyd*, 18 *Barb. (N. Y.)* 522; *Livingston v. Ketcham*, 1 *id.* 592; *Pearsall v. Post*, 20 *Wend. (N. Y.)* 111; *Corning v. Gould*, 16 *id.* 531.

⁶ *Hebert v. Lavalley*, 27 *Ill.* 448.

⁷ *Funkhouser v. Langkopf*, 26 *Mo.* 453; *Denton v. Jackson*, 2 *John. Ch. (N. Y.)* 320.

land in open common fields: the extent of this right and the mode of exercising it varies according to the custom which has prevailed among the occupiers of such land. Where, however, there is no custom which has become binding upon the parties, the common law rule appears to be, that those persons only who are owners of land within an open common field are entitled to enjoy the right of intercommoning; and such right can be exercised at those times only when the corn is off the land, that is, after all the corn and grain have been reaped and gathered, and before any more has been sown.¹ Where A, being possessed of a quantity of land in a common field, and having a right of common over the whole field, and B having also a right of common over the whole field, they entered into an agreement, for their mutual advantage and convenience, not to exercise their respective rights for a certain term of years, and each party covenanted to that effect; it was held, that if, during the term, the cattle of B came upon the land of A, he might distrain them, *damage feasant*.² There are also statutes pointing out the mode of exercising the right of common.³ The owners of land in open common fields may by custom mutually inclose against each other, and sometimes by statute. The remedies for a disturbance of common of pasture have been already mentioned.⁴

SEC. 246. *Common of turbary*.—Common of turbary is a right or liberty to dig turf upon the ground of another, or in the lord's waste: this common is appendant or appurtenant to a house, but not to lands, for turves are to be burnt in the house.⁵ It may also be in gross, or may

¹ *Cheesman v. Hardham*, 1 B. & Ald. 706; *Musgrave v. Cave*, Willes, 819. There can be no inter-commonage or common because of vicinage, unless there are contiguous townships, the inhabitants of which, seeking to excuse a trespass for that cause, have common rights of pasturage appendant, appurtenant, or in gross, in the towns where they reside. The fact that cattle are suffered, without objection, to run at large over the uninclosed woodlands of a new

country, affords no ground from which to imply a grant. *Supreme Ct.*, 1854, *Smith v. Floyd*, 18 Barb. 522.

² *Whiteman v. King*, 2 H. Bl. 4.

³ 29 Geo. 2, c. 36; 15 Geo. 3 c. 81.

⁴ *Hickman v. Thorne*, 2 Mod. 105; *Tyringham's Case*, 4 Co. R. 36 b, 38 b, 39 a; *Tudor L. C. Real Prop.* 101-126 (2d ed.); *Corbet's Case*, 7 Co. R. 5 a; *Jones v. Robin*, 10 Q. B. 587.

⁵ *Tudor L. C. Real Prop.* 116 (2d ed.).

be granted expressly with other land.¹ It does not give any right to the land, trees, or mines; nor can it exclude the owner of the soil;² but as this right never existed in this country, its discussion is of no practical value.

SEC. 247. *Nature and description of common of estovers.*—Common of estovers is a right or liberty of taking necessary wood for the use and furniture of a house or farm, from off another's land.³ This right is generally considered as being divided into three distinct species, distinguished from each other by a different application of the Saxon word "bote," which is synonymous with the French "estovers:" thus, there is a house-bote, plough-bote and hay-bote. House-bote is a sufficient allowance of wood to build or repair the house, or to burn in it, which latter is sometimes called fire-bote. Plough-bote and cart-bote are wood to be employed in making and repairing all instruments of husbandry, as ploughs, carts, harrows, rakes, forks, &c. Hay-bote or hedge-bote is wood for repairing hedges or fences, as pales, stiles, and gates to secure inclosures.⁴ These botes or estovers must be reasonable, and such as any tenant or lessee, except a strict tenant at will, may take off the land demised to him without waiting for any leave, assignment or appointment of the lessor, unless he be restrained by special covenant to the contrary.⁵ House-bote, hay-bote and fire-bote belong to a termor of common right, and he may take wood for the same; but if he takes more than is needful he may be punished for waste,⁶ as, if he cuts down wood to burn, when he has sufficient dead wood. Although the tenant may cut down and take sufficient wood to repair walls, fences or hedges as he found them, yet he cannot do so to make new ones.⁷ If a man has common of estovers by grant, he cannot build new houses to have common of estovers for those houses.⁸ The right to esto-

¹ O'Hare v. Fahy, 10 Ir. Com. L. 318, C. P.

² 4 Co. R. 37.

³ Co. Litt. 122 a; 2 Blac. Com. Tudor L. C. Real Prop. 114, 35; (2d ed.).

⁴ Wood's Inst. 344.

⁵ Fitz. N. B. 59; Co. Litt. 41.

⁶ Termes de Ley, 387, 396.

⁷ Co. Litt. 53; Wood's Inst. 525; Coke, 113.

⁸ Fitz. N. B. 180, H.; Arundel v. Steere, Cro. Jac. 25.

vers belongs and is incident to the state of every tenant, whether for life or years, except that of a strict tenant at will, for that is said to be too mean. Common of estovers cannot be appendant to land, but it must necessarily be to a house to be spent there.' A copyholder may take the necessary estovers or botes on his copyhold without a special custom; but to enable him to take them on the other lands, a special custom must be shown.'

If a man has common of estovers in the woods of another, and the owner of the wood cuts down all the wood, he who ought to have the estovers might, before 3 & 4 Will. 4, c. 27, s. 36 (which abolished real and mixed actions), have had an assize of his estovers; now it seems that an action on the case is the proper remedy.'

SEC. 248. Common of fishery.—Nature of.—Common of fishery is a right or liberty of fishing in another man's water.' *It can exist only in streams which are not navigable*, for the sea and all navigable rivers are open to all.' It is a profit *a prendre* and not a mere easement nor an interest in land.' It may be either appendant, appurtenant, or in gross.' It may exist by grant, or by prescription from time immemorial, or by user for such a period of time as is required by statute to fix a right by prescription,' but not by custom.' A custom for all the inhab-

¹ Co. Litt. 121 b; Fitz. N. B. 180, C. b; Tudor L. C. Real Prop. 115.

² 4 Co. R. 81 b. Common of estovers cannot be apportioned. Co. Litt. 164 b. If a partition of the premises is made without reserving the right of common to one alone, it extinguishes the right. *Livingston v. Ketcham*, 1 Barb. (N. Y.) 592. To the same effect is *Van Rensselaer v. Radcliff*, 10 Wend. (N. Y.) 639; *Leyman v. Abeel*, 16 Johns. (N. Y.) 80. *It seems*, that where a right of common devolves by operation of law upon several, they may jointly convey it to one. *Leyman v. Abeel*, 16 Johns. (N. Y.) 80; *Van Rensselaer v. Radcliff*, 10 Wend. (N. Y.) 639; and see *Livingston v. Ketcham*, 1 Barb. (N. Y.) 592. A prescription of twenty years will bar a claim to a right of common.

Denton v. Jackson, 2 Johns. Ch. (N. Y.) 320.

³ *Ashmead v. Ranger* (in error), 1 Ld. Rayd. 551; 2 Salk. 638; 1 Chit. Pl. 159.

⁴ Tudor L. C. Real Prop. 114 (2d ed.).

⁵ *Warren v. Matthews*, 6 Mod 79; *Baggott v. Orr*, 2 Bos. & P 472.

⁶ *Herbert v. Laughluyn*, Cro. Car. 492; *Wickham v. Hawker*, 7 M. & W. 68.

⁷ Tudor L. C. Real Prop. 114 (2d ed.).

⁸ 2 & 3 Will. 4, c. 71, s. 1; *Wickham v. Hawker*, 7 M. & W. 68.

⁹ *Gateward's Case*, 6 Coke, 60; *Atty. Genl. v. Matthias*, 4 K. & J. 579; *Grimstead v. Marlow*, 4 T. E. 717; *Lloyd v. Jones*, 6 C. B. 81; *Blewitt v. Tregoning*, 8 Ad. & El. 554.

itants of a town or parish to fish in a person's river is bad.' So a custom for all the inhabitants in a town to use a foot-path for angling with rods and lines for fish in the daytime, for recreation only, and not profit, is bad as setting up a custom to take a profit *a prendre in alieno solo*.¹ Common of fishery, to the exclusion of the owner of the soil, is contrary to law; though a person by prescription may have a separate right of fishing in such water, and the owner of the soil will be excluded;² for a man may grant the water without passing the soil. If one grant a separate fishery, neither the soil nor the water pass, but only a right of fishery.³

An exclusive right of fishery may exist either by grant or prescription, but neither by grant nor prescription can a person acquire a right to erect dams or other obstructions so as to prevent fish from going up the stream.⁴ A patent to the inhabitants of a town, conveying all the land under water within certain boundaries, together with the exclusive right of fishery in such waters, has

¹ Lloyd v. Jones, 6 C. B. 81, 89.

² Bland v. Lipscombe, 4 E. & B. 713, n. c.

³ Co. Litt. 122 a.

⁴ Bac. Abr. Tit. Piscary.

⁵ Brown v. Kennedy, 5 H. & J. (Md.) 195; People v. Platt, 17 John. (N. Y.) 195; Adams v. Pease, 2 Conn. 481. "In rivers not navigable," says LORD MANSFIELD, in Carter v. Murcot, 4 Burr. 2164, "the proprietors of land have the right of fishery on their respective sides, and it generally extends *ad filium aquæ*. But in navigable rivers, the proprietors of the land on each side have it not." These principles of common law are incontrovertible. If the term navigable is construed according to its popular import, every river capable of being sailed upon by a boat, however small or shallow, is embraced by it. Many of the inconsiderable streams which fall into a floatable river, are of this description. The same common law, however, which has established the principle, has furnished a definite explication of the term. Every river where the sea ebbs and flows, is, by the common law, con-

sidered as navigable; and all rivers not thus distinguished are not navigable. 2 Roll. 170, pl. 14; Royal Fishery of the Banne, Davies' Rep. 152, 5, 7; Carter v. Murcot, 4 Burr. 2162; The King v. Wharton, 12 Mod. 510; Hale's De Jure Maris, Harg. Law Tracts, 5; Lord Fitzwalter's Case, 1 Mod. 105; The distinction between rivers navigable and not navigable, that is, where the sea does, or does not, ebb and flow, is very ancient. The King v. Smith, Doug. 441. The former are called *arms of the sea*, while the latter pass under the denomination of *private or inland rivers*. "That is called an arm of sea where the tide flows and re-flows, and so far only, as the tide flows and re-flows." Hale De Jure Maris, cap. 4. *If a river runs contiguously between the land of two persons, each of them is owner of that part of the river which is next his land, of common right.*" Rex v. Wharton, 12 Mod. 510; and the right of fishery belongs exclusively to such adjoining owners. Beckman v. Kreamer, 43 Ill. 447; Adams v. Pease, ante; Ingram v.

been held to confer a right of fishing as the common property of the town, so as to give to the inhabitants the right to regulate the same at any legal meeting.¹ A town, however, does not, at common law, unless expressly granted to it, possess any right of property in a fishery within its limits. The right is in the public.² Unless a special grant or prescription is shown, a private right of fishery is limited to fresh water rivers where the tide does not ebb or flow,³ and in navigable streams the public have the right to fish, except an individual has acquired an exclusive right thereto by grant or prescription.⁴ Whether the State has the right to regulate private as well as public fisheries within its limits or not, is not now an open question, as the right has been assumed and acted upon for so long a period as to prevent any inquiry in that direction.⁵

Threadgill, 3 Dev. (N. C.) 59. Where a right is conferred by statute upon particular individuals, it is not assignable. *Munson v. Baldwin*, 7 Conn. 168; *Comm'rs v. Jennings*, 6 Cow. (N. Y.) 518; *People v. Tebbetts*, 19 (N. Y.) 523; *Com. v. Charlestown*, 1 Pick. (Mass.) 180; *Coumers v. Kempshall*, 26 Wend. (N. Y.) 404; *Scott v. Wilson*, 8 N. H. 321; *Beryl v. Carle*, 3 Me. 269; *Gould v. James*, 6 Cow. (N. Y.) 369; *Rogers v. Jones*, 1 Wend. (N. Y.) 237; *Brookhaven v. Strong*, 1 S. C. 415.

¹ *Rogers v. Jones*, 1 Wend. (N. Y.) 237.

² *Randolph v. Braintree*, 4 Mass. 814.

³ *Mayor v. Richardson*, 4 T. R. 437; *Arnold v. Mundy*, 5 N. J. L. 1; *Parker v. Mill Dam Co.*, 20 Me. 353; *Martin v. Waddell*, 16 Pet. (U. S.) 400; *Carter v. Murcott*, ante.

⁴ *Id.* Any person may take fish in such waters if he can do so without trespassing on the lands of individuals. *Com. v. Chapin*, 5 Pick. (Mass.) 199; *Coolidge v. Williams*, 4 Mass. 140; *Freery v. Cooke*, 14 Mass. 488, and extends to the taking of shell fish on the shores of navigable waters where the tide ebbs and flows, *Parker v. Cuttor Mill Dam Co.*, ante; *Moulton v. Libbey*, 37 Me. 472, upon

the general proposition stated in the text. See *Preble v. Brown*, 47 Me. 284. A free fishery is not an exclusive fishery. *Melvin v. Whiting*, 7 Pick. (Mass.) 79. A right to take shell fish does not carry with it a right to take the soil or dead shell fish imbedded therein, except such as necessarily adheres to the living fish taken. *Porter v. Shehan*, 7 Gray (Mass.) 435. In New Jersey it is held that no person can have an exclusive right to take fish from navigable waters. *Yard v. Carman*, 3 N. J. L. 936. And it is also held that the right of fishing is not inseparable from the soil. *Cobb v. Davenport*, 32 N. J. L. 369. In order to avail himself of a prescriptive right to a several fishery in navigable waters, the person claiming it is required to establish his right by clear proof, as all presumptions are against it. *Gould v. Jones*, 6 Cow. (N. Y.) 369. In the absence of a prescriptive right, there can be no exclusive right except by grant from the sovereign power. *State v. Glen*, 7 Jones (N. C.) 321; *Collins v. Benbury*, 5 Ired. (N. C.) L. 118; *S. C. 3 id.* 277.

⁵ *Smith v. Levins*, 8 N. Y. 472; *Com. v. Bailey*, 13 Allen (Mass.) 541; *Dunham v. Lamphere*, 3 Gray (Mass.) 368.

Merely clearing out a fishing place in a river, or making valuable improvements therein, does not give an exclusive right of fishery, nor does a person acquire such a right by stocking a stream.¹ But, a person who plants oysters in a stream, and clearly designates the bed, acquires such a property therein as enables him to maintain trespass against any one interfering therewith;² and his right of property is such as even persons navigating the waters are bound to respect, and if they wilfully or negligently commit a damage thereof they are liable therefor.³ A fishery may be leased, and a mere lease thereof does not pass an interest in the land, but simply a right to take fish from the water in the mode, and within the limits prescribed in the lease.⁴ A mere grant of a right to fish with nets, for a certain period, is not a lease of the fishery, but merely of the right to draw nets within the limits prescribed. And in any event, even if a lease, it could confer no more exclusive rights upon the lessee than the lessor had, and if his right simply consisted in fishing with nets, that right alone would pass, and the fishery would still remain in common.⁵ Indeed, although in navigable streams the right of fishing is common, yet the owners of the land bordering thereon have the exclusive right of drawing seines and taking fish *on their own lands*, that is, upon the flats that are covered only at high tide, if they belong to adjoining owners.⁶

¹ Westfall v. Van Arker, 12 John. (N. Y.) 424.

² Fleet v. Hegeman, 14 Wend. (N. Y.) 42; Decker v. Fisher, 4 Barb. (N. Y.) 592; Lowndes v. Dickerson, 84 id. 586.

³ Cobb v. Bennett, 75 Penn. St. 326; Mayor of Colchester v. Brooke, 6 Q. B. 339.

⁴ Cortelyou v. Van Brandt, 2 John. (N. Y.) 357.

⁵ Brink v. Richmeyer, 14 John. (N. Y.) 256. In Reed v. Greenberry, 8 Ired. (N. C.) L. 109, A leased a fishery to B, and covenanted with him that he should use the fishery for certain privileges and for the offal, which A was to have in part payment. B put up his fish in gross, and A sued

him for a breach of the covenants of the lease. It was held that the word offal meant such parts of the fish as were not used for food, and if B put up his fish in gross, though A's profits were diminished, yet there was no breach of covenant. An attempt was made to show a custom of fishermen to cut up their fish, but no general custom which is necessary to explain the meaning of words in a covenant was shown. Also, that the covenant by B did not amount to a stipulation to cut up the fish which he took at A's fishery.

⁶ Com. v. Shaw, 14 S. & R. (Penn.) 9; Lay v. King, 5 Day (Conn.) 72.

SEC. 249. *Navigable streams.*—In this country, the common law rule as to navigable streams—at least in most of the States—has been enlarged, and, while all streams in which the tide ebbs and flows are treated as navigable whether they are in fact so or not, so, too, *all* streams capable of serving a useful purpose in floating the products of the country either in a rough or manufactured state.¹

The test by which to determine the navigability of our rivers and streams is to be found in, and determined by, their actual navigable capacity for any useful purpose, and those rivers that are navigable *in fact* for useful purposes, and serve as a means of commercial intercourse either between points in the same State, or between States, are regarded as navigable, and are subject to that servitude irrespective of prescriptive use or statutory enactment.² This is a part of our common law, created by necessity, and applied by common consent, and, while there is some conflict in the cases, as to the relative rights of the public and of riparian owners, in this class of streams, yet in the main, I think our courts have exhibited less conflict upon this subject, and much more consistency than might have been expected to result from such a variety of questions as arise, and the varied conditions under which they are presented.

There is yet another class of streams which, although not navigable by “boats or lighters,” are yet susceptible of valuable use for the purpose of floating logs and other products of the country along its banks to market or to mills, and which are *floatable* in fact, and regarded as *quasi* navigable.³ In most of the States, while the test

¹ *Comm'rs v. Hemphill*, 26 Wend. (N. Y.) 404; *Morgan v. King*, 35 N. Y. 454; *Weise v. Smith*, 8 Or. 445. See *Folger v. Pearson*, 3 id. 455; *Tomlin v. Railroad Co.*, 32 Iowa, 106; *The Daniel Ball*, 10 Wal. (U. S. S. C.) 557; *The Montebello*, 11 id. 411; *Chicago v. McGinn*, 51 Ill. 266; *Volk v. Eldred*, 23 Wis. 410; *Scott v. Wilson*, 3 N. H. 321; *Georgetown v. Alexandria Canal Co.*, 12 Pet. (U. S.) 91; *Varick v. Smith*, 9 Paige's Ch. (N. Y.) 278; *Wardsworth v. Smith*, 2 Fair.

(Me.) 278; *Veazie v. Dwinel*, 50 Me. 496; *Knox v. Chaloner*, 42 id. 150; *McManus v. Carmichael*, 8 Iowa, 1; *People v. Tibbitts*, 19 N. Y. 523; *Hooker v. Cummings*, 20 Johns. (N. Y.) 90; *Palmer v. Mulligan*, 3 Caines (N. Y.) 307.

² *Wood on Nuisances*, 612; *The Daniel Ball*, 10 Wal. (U. S. S. C.) 559; *The Montebello*, 11 id. 411; *Chicago v. McGinn*, 51 Ill. 269.

³ *Morgan v. King*, 35 N. Y. 454; *Laney v. Clifford*, 54 Me. 491; *Brown v. Chadborne*, 31 id. 9;

of navigability is made to depend upon the capacity of the stream for that purpose, even though it be a fresh-water stream, yet all streams in which the tide ebbs and flows are regarded as navigable in law, and the rules of the common law applicable thereto, so far as the rights of the State and riparian owners are concerned, are adopted.¹ In all the cases referred to in the previous note, it is held that, while other streams than those in which the tide ebbs and flows to the point where the tide ceases to affect them, are navigable, yet the public do not have the same right of property in the *alveus* of fresh water, as in tide-water streams, and that on all fresh-water streams the owner of the banks also owns the bed of the stream to the "*medium filium aquae*," while in those affected by the ebb and flow of the tides, the title to the bed of the stream is in the State, and the titles of the riparian owners are restricted to high-water mark.²

People v. Canal Appraisers, 83 N. Y. 472; Weise v. Smith, 3 Or. 445; Palmer v. Mulligan, 3 Caines' Rep. (N. Y.) 807; Lorman v. Benson, 8 Mich. 18; Middleton v. Flat River Booming Co., 27 Mich. 583; Davis v. Winslow, 51 Me. 264; Veazie v. Dwinel, 50 id. 474; Magnolia v. Marshall, 39 Miss. 126; Com. v. Chapin, 5 Pick. (Mass.) 199; Volk v. Eldred, 23 Wis. 410; Stuart v. Clark, 2 Swan (Tenn.) 9; Rhodes v. Otis, 88 Ala. 578; Nearderhauser v. State, 28 Ind. 270; Moore v. Sanborne, 2 Mich. 523; Ellis v. Carey, 80 Ala. 725; Hubbard v. Bell, 54 Ill. 112.

¹In Avery v. Fox, 1 Abb. Ch. Rep. (U. S.) 246, it was held that the owner of land bordering upon a stream though navigable, in which the tide does not ebb and flow, is presumed to be the owner of the bed of the stream to the centre thereof. Com's v. People, 5 Wend. (N. Y.) 355; Shaw v. Crawford, 10 Johns. (N. Y.) 236; People v. Tibbetts, 19 N. Y. 523; Com's v. Hemphill, 26 Wend. (N. Y.) 404. See Morgan v. King, 85 N. Y. 454; Gray v. Burdick, 20 Pick. (Mass.) 186; Trustees v. Dickinson, 9 Cush. (Mass.) 544; Com. v. Chapin, 5 id. 190; Scott v. Wilson, 8 N. H. 321; Middleton v.

Page, 8 Conn. 221; Chapman v. Kimball, 9 id. 88; Spring v. Seavey, 8 Me. 138; Berry v. Carly, 3 Greenl. (Me.) 269; Brown v. Kennedy, 5 H. & Johns. (Md.) 195; Hays v. Bowman, 1 Rand. (Va.) 417; Lamb v. Ricketts, 11 Ohio, 311; Gavit v. Chambers, 3 Ohio, 495; Cates v. Waddington, 1 McCord (S. C.) 580; McCullough v. Wall, 4 Rich. (S. C.) 68; Stuart v. Clark, 2 Swan (Tenn.) 9; Magnolia v. Marshall, 39 Miss. 109; Com's v. Withers, 29 id. 21; Morgan v. Reading, 3 S. & M. (Miss.) 366; Mariner v. Schultz, 13 Wis. 692; Walker v. Shepardson, 4 id. 486; Schurmiur v. Railroad Co., 10 Minn. 82; Lorman v. Benson, 8 Mich. 18; Middleton v. Pritchard, 8 Scam. (Ill.) 500; Cox v. The State, 3 Black. (Ind.) 193; Hubbard v. Bell, 54 Ill. 110; Warren v. Chambers, 25 Ark. 120; State of Penn. v. The Wheeling Bridge Co., 18 How. (U. S.) 421.

²Hale's De Jure Maris; Trustees v. Bootle-cum-Linacre, L. R., 2 Q. B. 4. In Rex v. Smith, 2 Doug. 441, it was held that the soil of a navigable stream is not, by presumption of law, in the owner of the banks, but in the king; but that the title of the soil in all streams in which the tide does not

In New York it held that on all the larger navigable rivers of the State above the ebb and flow of the tide, which are boundaries between States, or which are highways for commerce between States, the title of riparian owners is restricted to highwater mark, as also upon all

ebb and flow is in the riparian owner. In that case a nice question arose as to what point in a stream in which the tide ebbs and flows, the navigability of the streams ends. The city of London under certain supposed powers, delegated to it by act of parliament, erected piles on the bed of the river Thames, near *Richmond*, within the high-water mark, some 80 feet from the shore, for the purpose of making a towing-path for horses, adjoining and contiguous to a wharf in the possession of the defendants. The defendants believing the towing-path and piles to be in violation of their rights, and a nuisance, cut away one of the piles, for which they were indicted. The defendants insisted that the tide did not ebb and flow in the Thames above London bridge, and that above that point it was kept navigable by artificial means, and that the tide above that point was occasioned by the pressure and accumulation backward of the river water, and that, therefore, the soil did not belong to the crown. LORD MANSFIELD said: "The distinction between rivers, navigable and not navigable, and those where the sea does not ebb or flow, is very ancient; but the point contended for, a distinction between the case of the tide occasioned by the flux of the sea water, or by the pressure backward of the fresh water of a river, seems to be entirely new, but there were no facts set forth in the case, which let in the consideration of that distinction. The case does not state whether the water, when the tide rises at Richmond, was fresh or salt, but it rather seems to be taken for granted that it was salt." A verdict was rendered against the defendants, which was sustained in the King's Bench. In *Attorney-General v. Wood*, 108 Mass. 36; 11 Am. Rep. 880, a similar question arose in reference to the rights of the public

and riparian owners upon the Mystic river above the point of navigability in fact, except for skiffs and small pleasure boats, but within the ebb and flow of the tide. It appeared that the tide rose and fell at the point in question about two feet, and that the ordinary depth of the channel was about the same. The defendant erected a dam at the point in question, in 1851, and maintained it there until 1870, when it was destroyed. The river is a small stream flowing into Boston harbor, and the defendant denied that it was navigable in fact; and it did not appear that it was, except for small pleasure boats. He also denied that it was navigable in law, and insisted that although the rise and fall of the water there was two feet, that it was occasioned by the meeting the salt water of the tide with the fresh water of the stream on its downward passage. But upon this point the court said: "The law on this point is well settled. It is the rise and fall of the water, and not the proportion of salt water to fresh, that determines whether a particular portion of a stream is within tide water," and the court cited *Rex v. Smith*, ante; *Peyroux v. Howard*, 7 Pet. (U. S. S. C.) 324, and *Lapish v. Bangor Bank*, 8 Me. 85, in support of its position. In reference to the actual navigability of the stream, except for pleasure craft, the court said: "Navigable streams are highways, and a traveller for pleasure is as fully entitled to protection in using a public way, whether by land or water, as a traveller for business. * * * If water is navigable for pleasure boating, it must be regarded as navigable water though no craft has ever been upon it for the purposes of trade or agriculture," thus overruling the doctrine of *Rowe v. Granite Bridge Co.*, 21 Pick. (Mass.) 844; *Charlestown v. County Com'rs* 3 Metc. (Mass.) 202, and *Murdock v. Stickney*, 8 Cush. (Mass.) 113.

streams navigable in their natural state, which have been declared navigable by statute.¹ It also seems to be the doctrine of the courts of that State, and indeed the doctrine of all the courts, that the waters of a stream in their natural condition, susceptible of beneficial use for the purposes of navigation and commerce, are *publici juris*, and may be declared navigable by the legislature, and become subject to all the restrictions of navigable streams, without compensation to riparian owners for injuries sustained. But that the legislature has not constitutional power to declare a stream navigable that is not so in fact, and which can be made navigable only by artificial means, without proper compensation to riparian owners for the damages inflicted upon them in depriving them of the use of the streams for ordinary purposes.² In several of the States no distinction is made between the rights of riparian owners upon fresh-water streams, navigable in fact, and those streams affected by the ebb and flow of the tide. But the same rule prevails as to *all*, and the bed of all navigable streams is held to be vested in the State.³ In several of the States where it is held that the title to the beds of the streams are in the State, the titles of riparian owners are extended to low-water mark, thus vesting in them the power and the right to erect and maintain wharves in front of their property, where it can be done without actual impediment to navigation.⁴

¹ *The People v. Canal Appraisers*, 38 N. Y. 461.

² *Morgan v. King*, 35 N. Y. 454; *Walker v. The Board of Public Works*, 16 Ohio, 540.

³ *Shrunk v. Schuylkill Co.*, 14 S. & B. (Penn.) 71; *Bridge Co. v. Kirk*, 46 Penn. 112; *Ellis v. Carey*, 80 Ala. 725; *Bullock v. Wilson*, 2 Porter (Ala.) 436; *Ingraham v. Threadgill*, 3 Dev. (N. C.) 59; *Collins v. Benbury*, 3 Ired. (N. C.) 277; *Stuart v. Clark*, 2 Swan (Tenn.) 9; *Elder v. Burns*, 6 Humph. (Tenn.) 358; *Haight v. Keokuk*, 4 Iowa, 199; *McManus v. Carmichael*, 3 Clarke (Iowa) 1; *Tomlin v. Dubuque*, 33 Iowa, 106; *Attorney-General v. Wood*, 108 Mass. 86.

⁴ Qualifiedly in *McManus v. Carmichael*, 3 Iowa, 1. But *contra*, *Haight v. Keokuk*, 4 id. 199; *Tomlin v. Dubuque*, 33 id. 106; *Elder v. Burns*, 6 Humph. (Tenn.) 385; *Stuart v. Clark*, 2 Swan (Tenn.) 9; *Blanchard v. Porter*, 11 Ohio 138. But later, that the title of riparian owners covers the bed of the stream if he owns on both sides. *Walker v. Board of Public Works*, 3 Ohio, 495; *Howard v. Ingersoll*, 17 Ala. 780; *Rhodes v. Otis*, 33 id. 38; *Ellis v. Carey*, 30 id. 725; *Flanagan v. Philadelphia*, 42 Penn. St. 219; *Bridge Co. v. Kirk*, 46 id. 112; *East Haven v. Hemmingway*, 7 Conn. 186.

Thus it will be seen that, in this country, there are three classes of navigable streams :

1st. Tidal streams that are navigable in law.¹

2d. Those that, although non-tidal, are yet navigable *in fact* for "boats or lighters" and susceptible of valuable use for commercial purposes ;² and

3d. Those which are *floatable*, or capable of valuable use in bearing the products of the mines, forests, and tillage of the country it traverses to mills or markets.³

It should be understood that, except in salt-water streams, so far as the tide ebbs and flows, the question of navigability is one of fact, and must be established by those who seek to use it as such ;⁴ and also, that the stream must be navigable in its *natural* state, unaided by artificial means or devices.⁵ If a stream is not susceptible of *valuable* use to the public as a navigable or floatable stream, without the erection of dams, it is not a navigable stream, even though it might be applied to that use after dams are erected. So, too, it must be susceptible of use for a considerable portion of the year,⁶ although the fact that it is dry at some seasons of the year, if for a considerable time at other seasons it is really floatable, will not destroy the public right of navigation.⁷ So, too,

¹ The Royal Fishers of the River Banne, Davy's Rep. 148.

² The Daniel Bell, 10 Wall. (U. S.) 555; The Montebello, 11 id. 411; Chicago v. McGinn, 51 Ill. 269.

³ Rhodes v. Otis, 33 Ala. 578; Weise v. Smith, 3 Oregon, 445; Morgan v. King, 80 Barb. (N. Y. S. C.) 9; affirmed Ct. of Appeals, 35 N. Y. 454; McManus v. Carmichael, 3 Iowa, 1; Veazie v. Dwinel, 54 Me. 160; Lorman v. Benson, 8 Mich. 18; State v. Canterbury, 28 N. H. 195, navigable by usage; Scott v. Wilson, 2 N. H. 321. (The Connecticut River above the ebb and flow of the tide held to be navigable for rafts and logs by long user.) See also Shaw v. Crawford, 10 Johns. (N. Y.) 236; Pitkin v. Olmstead, 1 Root (Conn.) 217, in which it is held that the Connecticut River above the tide is common to all. Bullock v. Wilson, 2 Port. (Ala.) 436; Martin v.

Bliss, 5 Blackf. (Ind.) 85; Depew v. Canal Co., 5 Ind. 8; Young v. Harrison, 6 Ga. 180; Jones v. Water Lot Co., 18 id. 539; Harrington v. Edwards, 17 Miss. 586; Dalrymple v. Mead, 1 Grant's Cases (Penn.) 197; Hubbard v. Bell, 54 Ill. 110; Lincoln v. Chadburne, 56 Me. 157; Hooper v. Hobson, 57 id. 273; Folger v. Pearson, 3 Oregon, 455; Valk v. Eldred, 23 Wis. 410; Munson v. Hungerford, 6 Barb. (N. Y.) 265; Varick v. Smith, 5 Paige (N. Y.) 148; Dwinel v. Veazie, 44 Me. 167.

⁴ McManus v. Carmichael, 3 Iowa, 1; Rhodes v. Otis, 33 Ala. 578; Morgan v. King, 35 N. Y. 454.

⁵ Morgan v. King, 35 N. Y. 454; Beryl v. Carl, 3 Me. 209; Wadsworth v. Smith, 2 Fair Me. 276.

⁶ People v. Tebbits, 19 N. Y. 523; Reynolds v. McArthur, 2 Peters, (U. S.) 417.

in order to make a stream legally *floatable*, and thus a public highway, it must be in such a condition that it will float logs or other productions of the country without artificial aid. Thus, in one case, it was held that a stream that would not float logs, without the aid of a person in a canoe, or of people on the banks to push them along, and when the logs were frequently injured by the difficulty in passing them through, the stream was not navigable in any sense.¹

The stream must be of such a character and capacity that it can be profitably and advantageously used during certain seasons of the year, in its natural state, for the passage of the products of the country through which it passes; but, while a stream that cannot at any season of the year be turned to profitable account for this purpose is not *floatable* in the legal sense, yet, if, in its natural state, it is susceptible of profitable use for such purposes at some seasons of the year, the fact that dams are erected, and that by the aid of those dams alone it is susceptible of such use at other seasons of the year, than those in which it would otherwise be used, does not prevent its use for such purposes at any season when, by the aid of such dams, it *can* be used.²

No definite legal test, by which to determine the question of navigability for the purposes of *floatage*, can be given. It is purely a question of fact, dependent upon the capacity of the stream, the products of the country, and the profitableness or unprofitableness of its use in that manner.³ If, in its natural state, it is capable of

¹ Morgan v. King, 85 N. Y. 454.

² Volk v. Eldred, 23 Wis. 410;

Moore v. Sanborne, 2 Mich. 423;

Wadsworth v. Smith, 11 Me. 278;

Naederhouser v. State, 28 Ind.

270; Veazie v. Dwinell, 50 Me. 579.

³ Morgan v. King, 85 N. Y. 454.

The natural capacity of the stream must be such as to make it serve a useful purpose to the public, as a means of floating the products of the country to mills and markets. Hence if it can be used only by a few individuals, and only for a few weeks in each year, it is not regarded as a public stream. Mun-

son v. Hungerford, 6 Barb. (N. Y.)

25; Burrows v. Gallup, 32 Conn.

501. Nor unless it is capable of

use without deepening or widening,

or other artificial means; as

by a dam, Volk v. Eldred, ante,

or digging out the channel or with

ening the stream. Wadsworth v.

Smith, 11 Me. 278; Veazie v.

Dwinell, 50 id. 479; People v.

Platt, 17 Johns. (N. Y.) 495. It

must serve a useful public pur-

pose, so as fairly to be said to be

of a public character, and bene-

ficial as a public highway for the

outlet of the products of the coun-

floating vessels, rafts, logs or other products of the country to market or to mills, and in that respect is fairly susceptible of beneficial use to the public, for any considerable portion of the time, then it may be used by the public for that purpose, but the owner of the *alveus* of the stream is not thereby prevented from using the stream in all ways and for all purposes not inconsistent with its use by the public.¹

The riparian owner may apply the water to use for the propulsion of machinery, and for that purpose may erect a dam across the stream where the stream is simply *floatable*, leaving suitable ways for passage of logs and other products.² The right of the public for passage with logs, &c., is superior to the right of the riparian owner, and if he erects obstructions in the stream which prevents, endangers or materially hinders the passage of rafts or logs, whether such obstruction is in the form of a dam or otherwise, such obstruction is a nuisance and subjects the person making it, not only to an action for the damages sustained by the owners of rafts or logs obstructed by it, but also to indictment as for a public

try it traverses. *Curtis v. Keeler*, 15 Barb. (N. Y.) 511; *Hubbard v. Bell*, 54 Ill. 112; *Treat v. Lord*, 42 Me. 582; *Brown v. Chadbourne*, 31 id. 9; *Morgan v. King*, 18 Barb. (N. Y.) 277; 85 N. Y. (Court of Appeals) 454; *Walker v. Shepardson*, 4 Wis. 486; *Stuart v. Clark*, 2 Swan (Tenn.) 9; *Moore v. Sanborne*, 2 Mich. 253; *Weise v. Smith*, 8 Oregon, 445; *Falyer v. Robinson*, id. 458; *Naederhouser v. State*, 28 Ind. 270; *Rhodes v. Otis*, 33 Ala. 578; *Laney v. Clifford*, 54 Me. 489. In such streams it is not necessary that they should be susceptible of navigation against the current. *Morgan v. King*, ante; *Lorman v. Benson*, 8 Mich. 18. But, upon the authority of *all* the cases, it must be susceptible of bearing the products of the country in a state fit for market, so as really to serve a valuable and beneficial public purpose. Whether it is navigable for such purpose is a question of fact, and must be established by those asserting the

right to use it for that purpose. *Rhodes v. Otis*, ante. In determining the question of navigability, it is the *valuable* more than the *continual* capacity that is to be considered. The real question is, can it be made a *valuable* and *beneficial* aid to the public in getting the products of the country to market. *Lorman v. Benson*, ante; *Rice v. Ruddington*, 19 Mich. 125; *Drawbridge Co. v. Halliday*, 4 Ind. 36; *Martin v. Bliss*, 5 Blackf. (Ind.) 135; *Depew v. Canal Co.*, 5 Ind. 8; *Moore v. Sanborne*, 2 Mich. 518.

¹ *Lorman v. Benson*, 8 Mich. 18; *Laney v. Clifford*, 54 Me. 491; *Morgan v. King*, 18 Barb. (N. Y.) 277; *Scofield v. Lansing*, 17 Mich. 487. See note in *Washington on Easements*, p. 507; *Avery v. Fox*, 1 Abb. (U. S. C. C.) 246; *Yates v. Milwaukie*, 10 Wal. (N. S.) 497.

² *Scofield v. Lansing*, 17 Mich. 487; *Thurman v. Morrison*, 8 B. Mon. (Ky.) 367; *Douglass v. State*, 4 Wis. 387.

nuisance, and the person so injured by the obstruction may abate so much of the same as is necessary to secure the proper exercise of his right.¹

But, while the right of passage for the public must on the one hand be respected by the riparian owner, so on the other hand must the rights of the riparian owner be respected by the public, and where a river is merely *floatable* the public have no right to so use it as to destroy its beneficial use for manufacturing purposes.² Thus it has been held that persons using a *floatable* stream have no right to erect dams thereon, and thereby detain and hold the water to be let off in such a manner as to aid in the floating of logs, when, by such dams, the water is withheld from mill-owners below, to their injury, even though except for such dams the stream could not be used for floatage at certain seasons of the year.³

Thus, it will be seen that, in order to determine whether the owners of land bordering upon a stream navigable in fact, but in which the tide does not ebb and flow, have a private right of fishery or not, depends upon the question whether, in the State where the question arises, he is treated as being the owner of the soil *ad filium aquæ*, or is restricted to low-water mark. In any event, it must also be remembered that fish, uncaught, are not absolutely the property of the owner of the stream, but that he has simply a qualified or *quasi* property therein, while they remain in the water upon his land, but this property is lost whenever they escape beyond the limits of his boundaries.⁴

SEC. 250. *Watercourse.*—Definition of.—A watercourse is water flowing between banks more or less defined. To constitute a watercourse in which rights may exist, or may be acquired by user or otherwise, the flow of water

¹ Renwick v. Morris, 7 Hill (N. Y.) 575; Memphis R. R. Co. v. Hicks, 5 Sneed (Tenn.) 427; Barnes v. Racine, 4 Wis. 454; Burrows v. Pixley, 1 Root (Conn.) 363; Brown v. Watrous, 47 Me. 161; Gerrish v. Brown, 51 id. 256; Veazie v. Dwinel, 50 id. 479; Knox v. Calo-

ner, 42 id. 156; State v. Freeport, 43 id. 198; Powers v. Irish, 23 Mich. 429.

² Scofield v. Lansing, 17 Mich. 437.

³ Middleton v. Flat River Booming Co., 27 Mich. 533.

⁴ Taylor's Landlord and Tenant, 193.

must possess that unity of character by which the flow on one person's land can be identified with that on his neighbor's land. Water which squanders itself over an indefinite surface is not a watercourse, nor a proper subject-matter for the acquisition of a right by user.¹ But the moment the water of a spring runs into a definite channel, it constitutes a watercourse;² and all accessions to such stream, from whatever source, form a part of it.³

SEC. 251. *Nature of rights in natural streams.*—Flowing water is *publici juris*, not in the sense that it is a *bonum vacans*, to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only, that *all may reasonably use it who have a right of access to it*; that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the term of his possession only.⁴ The right to the use of flowing water is clear. *Prima facie* the proprietor of each bank is the proprietor of half the land covered by the stream, *ad medium filum aquæ*, but there is no property in the water. Each proprietor of the land has a right to the advantage of the stream *flowing in its natural course* over his land, and to use the same as he pleases for any purpose of his own, not inconsistent with a similar right in the proprietors of land above or below; so that neither can any proprietor above diminish the quantity or injure the quality of the water which would otherwise naturally descend, nor can any proprietor throw back the water, without the license or the grant of the proprietor above;⁵

¹ *Shields v. Arndt*, 15 N. J. Eq. 234; *Dickinson v. Worcester*, 7 Allen (Mass.) 9; *Eulrich v. Richter*, 37 Wis. 226; S. C. 41 id. 818; *Barnes v. Sabron*, 10 Nev. 217; *Luther v. Winnismet Co.*, 9 Cush. (Mass.) 191; *Wagner v. Long Island R. R. Co.*, 2 Hun (N. Y. S. C.) 633; *Briscoe v. Drought*, 11 Ir. Com. L. R. 250; *Rawson v. Taylor*, 11 Exchq. 369; *Broadbent v. Ramsbottom*, id. 602.

² *Dudden v. Guardians of Clut-*

ton Union, 1 H. & N. 627; *Gillett v. Johnson*, 30 Conn. 180; *Macomber v. Godfrey*, 108 Mass. 219; 11 Am. Rep. 349; *Ashley v. Wolcott*, 11 Cush. (Mass.) 193; *Gannon v. Hargdon*, 10 Allen (Mass.) 106; *Franklin v. Fisk*, 13 id. 211.

³ *Wood v. Waud*, 3 Exch. 748.

⁴ *Embrey v. Owen*, 6 Exch. 369. *Mason v. Hill*, 3 B. & Ad. 304; 5 id. 1.

⁵ *Merritt v. Brinkerhoff*, 17 John. (N. Y.) 306; *Hetrick v. Deuchler*,

or a right to do so acquired by prescription from time immemorial, or by user for the period prescribed by statute.¹ Every riparian proprietor has a right to the reasonable use of water flowing past his land; namely, for his domestic purposes, and for his cattle. He has also the right to the use of the water for any other purpose, provided he does not thereby interfere with the rights of the proprietors either above or below him.² Subject to this condition, a riparian proprietor may dam up the stream for the purpose of a mill, or divert the water for the purposes of irrigation; but he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors and inflicts upon them a sensible injury.³ He has a right by means of water-wheels and machinery,

6 Penn. St. 32; *Merritt v. Parker*, 1 N. J. L. 460; *Dorman v. Ames*. Where a lease conveyed the right to draw a certain quantity of water from a canal of the lessors to the mills of the lessees, and contained a reservation excepting and reserving to the said lessors, however, the control of the water in the W river, and in all mill ponds, bays, lakes, and reservoirs at and above said premises, with the right of holding back and retaining and discharging the water therefrom at their pleasure, an abatement of the rent hereinafter mentioned being made in case said lessees shall be interrupted in the use of said mills thereby,—*Held*, upon a consideration of the whole instrument together, that the lessors could not, at their pleasure, erect a barrier to prevent the flow of water from their reservoir into the canal, and in that way terminate the lease, when such course was not necessary in their general control and management of the water. *Cole v. Lake Company*, 54 N. H. 242; *Pierce v. Kinney*, 59 Barb. (N. Y.) 56; *Woodbury v. Short*, 17 Vt. 387; *Wallace v. Drew*, 59 Barb. (N. Y.) 413; *Shamleffer v. Council Grove Co.*, 18 Kan. 24; *Acquachanonk Water Co. v. Watson*, 29 N. J. Eq. 366; *Taylor v. Welch*, 6 Oregon, 198; *Mason v. Hill*, 5 B. & Ald. 1, 24; 3 B. & Ad. 304; 5 id.

1; *Wright v. Howard*, 1 Sim. & Stu. 190, 203; *Acton v. Blundell* (in error), 12 M. & W. 348, 349; *Tyler v. Wilkinson*, 4 Mas. (U. S.) 397.

¹ *Belknap v. Trimble*, 3 Paige's Ch. (N. Y.) 605; *Haight v. Price*, 21 N. Y. 241; *Norton v. Valentine*, 14 Vt. 243; *Butman v. Hussey*, 12 Me. 407; *Hatch v. Dwight*, 17 Mass. 296; *Webb v. Portland Mfg. Co.*, 3 Sum. (U. S.) 189; *Bolivar v. Mfg. Co.*, 16 Pick. (Mass.) 241; *King v. Tiffany*, 9 Conn. 163; *Drewett v. Sheard*, 7 C. & P. 465; *Sampson v. Hoddinott*, 1 C. B. N. S. 590; 3 id. 596; *Moore v. Webb*, 1 C. B. N. S. 673; *Carlyon v. Lovering*, 1 H. & N. 784; *Murgatroyd v. Robinson*, 7 E. & B. 391; *Gaved v. Martyn*, 19 C. B. N. S. 732; *Tudor L. C. Real Prop.* 159-168.

² *Tyler v. Wilkinson*, 4 Mas. (U. S.) 397; *China v. Southwick*, 12 Me. 238; *Williams v. Gale*, 3 H. & J. (Md.) 281; *Richardson v. Kerr*, 34 Cal. 69; *Lapham v. Curtis*, 5 Vt. 371; *Hodges v. Hodges*, 5 Met. (Mass.) 205; *Milner v. Gilmour*, 13 Moore P. C. C. 131; *Sampson v. Hoddinott*, 1 C. B. N. S. 590; 3 id. 596; *Embrey v. Owen*, 6 Exch. 353; *Ld. Norbury v. Kitchin*, 3 F. & F. 292.

³ If he raises his dam so as to flood the lands of upper owners, or unreasonably holds it back from

erected by him for that purpose, to pump up water from the stream to a reservoir, and to convey it thence by pipes to his dwelling-house upon another estate at a distance from the stream, and there to apply such water to his domestic and other necessary purposes of utility; provided he takes only a reasonable quantity with reference to the size of the stream and the rights of his neighbor; but he has no right to take more water by means of the wheels and machinery than he would have a right to take otherwise.¹ The proprietor of a watercourse has a right to avail himself of its momentum as a power which may be turned to beneficial purposes; and he may make a reasonable use of the water itself for domestic purposes, for watering cattle, or even for irrigation, provided it is not unreasonably detained or essentially diminished.² A riparian proprietor has a right to divert water to a reasonable extent for the purposes of irrigation; but the extent of such user must depend upon the circumstances of each case. It must not be such as materially to prejudice any proprietor below.³ If a ripa-

lower owners, he is liable for the consequences. *Mayor v. Bailey*, 8 Den. (N. Y.) 438; *Johns v. Stevens*, 8 Vt. 308; *Webb v. Portland Mfg. Co.*, 8 Sum. (U. S.) 189; *Mabie v. Mattison*, 17 Wis. 1; *Shaw v. Cumiskey*, 7 Pick. (Mass.) 76; *Springfield v. Harris*, 4 Allen (Mass.) 496; *Casebeer v. Mowry*, 55 Penn. St. 473; *Davis v. Getchell*, 50 Me. 604; *Ferrea v. Knipe*, 28 Cal. 343; *Milner v. Gilmour*, 12 Moo. P. C. C. 131; 7 W. R. 328; *Lord Norbury v. Kitchin*, 8 F. & F. 292; 9 Jur. N. S. 132, Exch.

¹ *Lord Norbury v. Kitchin*, ante.

² *Blanchard v. Baker*, 8 Me. 258; 6 Exch. 365.

³ *Embrey v. Owen*, 6 Exch. 353, 372; *Ld. Norbury v. Kitchin*, ante. In *Wadsworth v. Tillotson*, 15 Conn. 369, it was held that a diversion of the water reasonably necessary for domestic uses, and a reasonable use of water for other purposes, is not a nuisance, and that the question of reasonableness is always for the jury. *Gillett v. Johnson*, 30 Conn. 183; *Evans v. Merriweather*, 8 Scam. (Ill.)

492. See *Bliss v. Kennedy*, 43 Ill. 73; *Ferrea v. Knipe*, 28 Cal. 344; *Johns v. Stevens*, 8 Vt. 308; *Blanchard v. Baker*, 8 Me. 253; *Stein v. Burden*, 29 Ala. 127; *Smith v. Adams*, 6 Paige (N. Y. Ch.) 435; questioned in *Trustees v. Youmans*, 50 Barb. (N. Y. Sup. Ct.) 319; *Elliot v. Fitchburg R. R. Co.*, 10 Cush. (Mass.) 191; *Pugh v. Wheeler*, 2 Dev. & B. (N. C.) 50; *Bealey v. Shaw*, 6 East, 208; *Corning v. Troy*, 34 Barb. (N. Y. S. C.) 485. In *Kidd v. Lard*, 15 Cal. 161, it was held that where a person had acquired a right by grant from the United States government to divert water from a running stream, with no restrictions as to the point from which it should be taken, the place of diversion or the mode of use might be changed at any time, if no one was injured thereby. But when the rights of others are affected thereby no change can be made. See, also, *Butte v. Morgan*, 19 Cal. 609; *Mitchell v. Parks*, 26 Ind. 354; *Pratt v. Lawson*, 2 Allen (Mass.) 275; *Arthur v. Case*, 1 Paige Ch. (N. Y.)

riar proprietor unreasonably *detain* the water of a stream for purposes of irrigation, whereby another proprietor lower down the stream is deprived of the use of the water daily for several hours, until it is too late for him to use it for irrigating his land, or for any other lawful and necessary purpose, he may maintain an action.¹ A proprietor of land contiguous to a stream may, *as soon as he is injured* by the diversion of the water from its natural course, maintain an action against the party so diverting it; and it is no answer to the action that the

448; *Curtis v. Jackson*, 13 Mass. 507; *Webb v. Portland Manuf. Co.*, 8 Sum. (U. S.) 187; *Vanderbergh v. Van Bergen*, 18 Johns. (N. Y.) 212. In *Crocker v. Bragg*, 10 Wend. (N. Y.) 260, an island divided the stream so that only a small portion of it descended on the defendant's side of the island and the balance on the other side. The defendant placed obstructions at the head of the island for the purpose of diverting more of the water of the stream to his side. The Court held that each owner was entitled to all the water that naturally descended to him, and that where there was a natural barrier that divided the stream, neither owner could erect obstructions to change the natural course of the water. But the water of a stream may be diverted on one's own land if it is returned again to its original channel without sensible diminution to the injury of those lower down on the stream. *Norton v. Valentine*, 14 Vt. 239; *Johnson v. Lewis*, 18 Conn. 303. Water may be diverted by sluices or artificial channels for a reasonable use, and no liability attaches for that insensible loss of the water consequent upon its reasonable beneficial use. *Wadsworth v. Tillotson*, 15 Conn. 366. The diversion or obstruction of water, in order to be actionable, must be such as to injure the lower owners, and no prescriptive right can be acquired unless such use does operate injuriously. But the diversion or obstruction of *all* the water is actionable, or of such a quantity as sensibly diminishes its natural flow. *Davis v. Fuller*, 12 Vt. 178; *Norton v. Valentine*,

14 Vt. 230; *Parker v. Hotchkiss*, 25 Conn. 321; *Webster v. Flemming*, 2 Humph. (Tenn.) 518; *Plumleigh v. Dawson*, 1 Gilman (Ill.) 544; *Miller v. Lapham*, 44 Vt. 416; *Snow v. Parsons*, 28 Vt. 49. But when the diversion is by one who has no legal right to make it, an action may be maintained by a riparian owner, even though no actual damage is sustained. *Whipple v. Cumberland Manufacturing Co.*, 2 Story (U. S.) 661; *Butman v. Hussey*, 3 Fairfax (Va.) 407. In *Parker v. Griswold*, 17 Conn. 288, it was held that, in order to maintain an action for diversion, it is not necessary to allege that the plaintiff had a mill upon his premises, but that an allegation of injury to the land is sufficient. *Leggett v. Kenton*, 2 Rich. (S. C.) 456. But the injury must be perceptible, and not merely theoretical. *Thompson v. Crocker*, 9 Pick. (Mass.) 59; *Merritt v. Parker*, Coxe (N. J.) 46; *Pugh v. Wheeler*, 2 Dev. & Bat. (N. C.) 56; *Omelyvany v. Jagers*, 2 Hill (N. Y.) 684. Diverting water for purposes of irrigation is unlawful, when. *Anthony v. Lapham*, 5 Pick. (Mass.) 175; *Weston v. Alden*, 8 Mass. 136; *Arnold v. Foot*, 12 Wend. (N. Y.) 330.

¹ *Sampson v. Hoddinot*, 1 C. B. N. S. 590; 3 id. 596; *Snow v. Parsons*, 28 Vt. 457; *Parker v. Hotchkiss*, 25 Conn. 321; *Robertson v. Miller*, 40 id. 40; *Keeney v. Wood Mfg. Co.*, 39 id. 576; *Oregon Iron Co. v. Terwilliger*, 3 Oreg. 1; *Springfield v. Harris*, 4 Allen (Mass.) 464; *Stein v. Burden*, 29 Ala. 127; *Foster v. Fowler*, 2 T. & C. 425; *Ripka v. Sargeant*, 7 W. & S. (Penn.) 9.

defendant first appropriated the water to his own use, unless he has had twenty years' undisturbed enjoyment of it in its altered course.' So where the water is improperly heightened and penned and forced back upon the plaintiff's land situate higher up the stream,¹ or the stream is heated or otherwise polluted with the refuse of a mill or works higher up the stream, or in any way.² The right to have a stream flow *in its natural state*, without diminution or alteration, and uncontaminated by artificial means, is *a natural right incident to the property* in the land through which it passes, and not a mere easement.³ The owner of such property has a right to have the stream come to him in its natural state in flow, quantity and quality, and to go from him without obstruction, upon the same principle that he is entitled to have the air come to him over his neighbor's soil reasonably pure and in its natural state. Such a right in no way depends upon prescription, or the presumed grant of his neighbor, nor from presumed acquiescence of the proprietors above and below.⁴ By grant,

¹ Mason v. Hill, 5 B. & Ald. 1.

² Saunders v. Newman, 1 B. & Ald. 258.

³ Wood v. Waud, 3 Exch. 748; Carlyon v. Lovering, 1 H. & N. 784; Whaley v. Laing, 2 H. & N. 476; 3 Id. 675; 5 Id. 480; Murgatroyd v. Robinson, 7 E. & B. 391; Magor v. Chadwick, 11 Ad. & El. 571; Mason v. Hill, 3 B. & Ad. 304; 5 Id. 1. A person who pollutes the water of a stream so as to diminish its value for domestic or manufacturing purposes, is guilty of an actionable nuisance. Stockport Waterworks Co. v. Potter, 7 H. & N. 159; Wood v. Sutcliffe, 16 Jur. 75; Attorney-General v. Gee, L. R., 10 Eq. Cas. 131; Goldsmith v. Tunbridge Wells Imp. Co., L. R., 1 Ch. App. 349; Lillywhite v. Trimmer, 16 L. T. N. S. 318; Cushart v. Auburn Gas Light Co., 23 Barb. (N. Y.) 444; Wilts v. Navigation Co., L. R., 9 Ch. App. 451; Hudson R. R. Co. v. Laeb, 7 Robt. (N. Y. Superior Ct.) 248; Attorney-General v. Leeds, L. R., 5 Ch. App. 583; Norton v. Schofield, 9 M. & W. 663; Carlyon v. Lovering, 1

H. & N. 784; Jones v. Crow, 32 Penn. St. 393; Merrifield v. Lombard, 18 Allen (Mass.) 16; Holman v. Boiling Springs Co., 14 N. J. Eq. 384; Attorney-General v. Steward, 20 N. J. L. 415; Lewis v. Stein, 16 Ala. 214; Wormsley v. Church, 17 L. T. N. S. 190; Ottawa Gas Co. v. Thompson, 39 Ill. 601; Brown v. Illins, 25 Conn. 583; Howell v. McCoy, 3 Rawle (Penn.) 356; Clowes v. Staffordshire Waterworks Co., L. R., 8 Ch. App. 126; Lingwood v. Stowmarket Co., L. R., 1 Eq. Cas. 77; Crossley v. Lightower, L. R., 8 Eq. Cas. 279; L. R., 2 Ch. App. 478; O'Riley v. McChesney, 3 Lans. (N. Y. S. C.) 278; Snow v. Parsons, 28 Vt. 459; Hounsee v. Hammond, 39 Barb. (N. Y.) 89; Hayes v. Waldron, 44 N. H. 585.

⁴ Embrey v. Owen, 6 Exch. 353; Dickinson v. Grand Junction Canal Co., 7 Exch. 282; Chasemore v. Richards, 2 H. & N. 168; 7 H. L. Cas. 349; Rawstron v. Taylor, 11 Exch. 381; Tyler v. Wilkinson, 4 Mas. (U. S.) 397.

⁵ Chasemore v. Richards, ante.

or by prescription from time immemorial,¹ a riparian proprietor may acquire a right to use the water in a manner not justified by his natural right; but such acquired right is an easement, and has no operation against the natural rights of a landowner higher up the stream, unless the user by which it was acquired affects the use that he himself has made of the stream, or his power to use it, so as to raise the presumption of a grant, and so render the tenement above a servient tenement.* Nothing short of twenty years' undisturbed possession of water diverted from the natural channel, or raised by a dam, can give a party an adverse right against those whose lands lie lower down the stream, and to whom it is injurious; a possession for a less period than is required by statute is not sufficient.² A riparian proprietor derives his right in respect of the water from possession of *land abutting on the stream*, and if, by a deed which conveys only land not abutting on the stream, he affects to grant water rights, the grant, though valid as against the grantor, can create no rights for an interruption of which the grantee can sue a third party in his own name.³ The abstraction of water from a natural stream openly and under a claim of right for a period of twenty years to a tenement *not abutting* on the stream will create no easement to have pure water flow down the stream to the point of abstraction.⁴

SEC. 252. *Rights between mill-owners on the same stream.* The rights of mill-owners upon the same stream, are to be construed according to their respective rights under the conveyance under which they hold, and in reference to their prescriptive rights, if they have acquired any. Upper mill-owners have a right to the first use of the water, and to detain it reasonably for that purpose.⁵ As

¹ Ante, p. 369.

² *Sampson v. Hoddinott*, 1 C. B. N. S. 590; 3 Id. 596; *Wright v. Williams*, 1 M. & W. 77; *Murgatroyd v. Robinson*, 7 E. & B. 391; *Wood v. Waud*, 3 Exch. 778; *Greatest v. Hayward*, 8 Exch. 291; *Carlyon v. Lovering*, H. & N. 797.

³ *Prescott v. Phillips*, cited 6 East, 213.

⁴ *The Stockport Waterworks Co. v. Potter*, 3 H. & C. 300.

⁵ Id.

⁶ *Platt v. Root*, 16 John. (N. Y.) 92; *Palmer v. Mulligan*, 3 Caines (N. Y.) 307; *Davis v. Winslow*, 51

to what is a reasonable use of water on a stream, is always a question of fact to be determined by a jury, and is to be arrived at, first, by ascertaining the capacity of the stream, the nature and character of the works sought to be propelled thereby, the kind of wheels and machinery used, and the *reasonable* necessities of the mill-owner in view of all those facts, and the custom of the country, if there be any, in a beneficial application of the water.¹ A man must adjust his uses of the water to the capacity of the stream. He may not erect a dam and build mills to be propelled by the water of a stream, that in their requirements are far beyond the ordinary capacity of the stream to supply the power for, neither has he a right to use wheels which require an excessive amount of water to propel; but in this use, both in the requirements of the works and in the character of his machinery, he must have a reasonable regard to the ordinary capacity of the stream, and when he has thus conformed his use of the water to the capacity of the stream, he may detain the water from the mills below to the extent necessary to make it beneficial to him, even though it takes the entire water of the stream.² If, however, there is sufficient water for all the mills, if reasonably used, then it is the right of each mill-owner to require of the others such a use of the water as shall yield him his proper supply.³ The upper owner may detain the water so long as is *necessary* for the purpose of working his mills; but he must, at his peril, see to it that he does not unnecessarily or unreasonably detain it.⁴

Me. 290. Parker v. Hotchkiss, 25 Conn. 351; Olney v. Fenner, 2 R. I. 311; Martin v. Bigelow, 2 Aiken (Vt.) 185; King v. Tiffany, 9 Conn. 162; Barrel v. Wells, 22 Pick. (Mass.) 237; Wood on Nuisances, 458 et seq.

¹ Thomas v. Brackney, 17 Barb. (N. Y. S. C.) 654; Hill v. Waud, 2 Gillman (Ill.) 235; Gould v. Boston Duck Co., 13 Gray (Mass.) 443; Sampson v. Hoddinot, 38 Eng. Law & Eq. 241; Pollitt v. Long, 3 N. Y. S. C. Rep. (Parsons' Ed.) 232; 58 Barb. (N. Y. S. C.) 79; Hetrick v. Deuchler, 6 Barr (Penn.) 32.

² Gould v. Boston Duck Co., 13

Gray (Mass.) 443; Pollitt v. Long, 3 N. Y. S. C. (Parsons' Ed.) 232; Whalen v. Ahl, 29 Penn. St. 98; Clinton v. Myers, 46 N. Y. 511; Timm v. Bear, 29 Wis. 254.

³ Snow v. Parsons, 28 Vt. 459.

⁴ Whalen v. Ahl, 29 Penn. St. 98; Pollitt v. Long, 3 N. Y. S. C. Rep. (Parsons' Ed.) 232; Snow v. Parsons, 28 Vt. 459; Parker v. Hotchkiss, 25 Conn. 331; Barrett v. Parsons, 10 Cush. (Mass.) 367. In Timm v. Barr, 29 Wis. 254, it is held that an upper mill-owner has, generally, no right to deprive the lower mill-owners of the natural flow of the water, and that in determining what is a

SEC. 253. Question of reasonableness for jury.—As to what is a reasonable detention or use of water is always a question of fact to be determined by the jury from the circumstances of each case, and in determining the question, a variety of considerations are to be considered, such as the size of the stream, the adaptability of the machinery to the ordinary condition and volume of the stream, the uses to which it is or can be applied, as well as the character of the machinery used as compared with the improvements in machinery for a similar purpose, and, in the language of Foster, J., in a recent case in New Hampshire, “where, under *all* the circumstances of the case, it is or is not a reasonable use of the stream; and in determining that question, the extent of the benefit to the mill-owner, and of the inconvenience to others, may very properly be considered.”¹ The right of a mill-owner is to *use* the water, but he has no right to divert it entirely from the stream. If he conducts it away from the stream to a mill, he must see to it that it is returned again before it leaves his premises, so that an owner below is not damaged by the act.² So, too, a mill-owner is bound to so maintain his dam (unless he has acquired a prescriptive right to do otherwise) so as not to set the water back upon the land or the wheels and machinery of an upper mill,³ or so as to discharge it in a *fitful* manner, to the injury of an owner below.⁴

SEC. 253. Limitation upon right to dam water.—The rights of a riparian owner to dam the stream have been previ-

reasonable detention, reference may be had to the kind of machinery used in the upper mill, and its adaptability for use on such a stream. See *Brace v. Yale*, 99 Mass. 488; *Clinton v. Myers*, 46 N. Y. 511.

¹ *Norway Plains Co. v. Bradley*, 52 N. H. 110; *Hays v. Waldron*, 44 id. 584; *Bassett v. Salisbury Manufacturing Co.*, 43 id. 567.

² *Sackrider v. Beers*, 10 Johns. (N. Y.) 241; *Brissell v. Shall*, 4 Dallas (U. S.) 211; *Merritt v. Brinkerhoff*, 17 Johns., (N. Y.) 306; *Stein v. Burden*, 29 Ala. 127.

³ *Wright v. Howard*, 1 Sim. & Stu. (Ch.) 203; *Saunders v. Newman*, B. & Ad. 258; *Butz v. Irec*, 1 Rawle (Penn.) 218; *Stiles v. Hooker*, 9 Cow. (N. Y.) 286; *Gilman v. Tilton*, 5 N. H. 232; *Hodges v. Raymond*, 9 Mass. 816; *Hill v. Ward*, 7 Ill. 283; *Cheek v. McAlley*, 11 Rich. (S. C.) 153.

⁴ *Stein v. Burden*, 29 Ala. 127; *Mabie v. Mattison*, 17 Wis. 1; *Corning v. Troy, &c.*, 89 Barb. (N. Y. S. C.) 311; *Davis v. Getchell*, 50 Me. 604; *Hume v. Shrieve*, 3 Green's Ch. (N. J.) 116.

ously discussed. The right exists so long as it can be done without injury to the property or rights of others, but if a dam is erected so as to injure the lands above or below the mill by flooding them, or otherwise producing injury thereto of which the dam is the proximate cause, it is a nuisance, and its maintenance unlawful.¹ If, by hoarding the water by a dam, the water is set back and held so that it impairs the health of those living on the stream, or as to impair their comfort by reason of the noxious vapors arising therefrom, this is not only an actionable but an indictable nuisance.² Or if it interferes with the drainage of lands,³ destroys springs,⁴ charges the soil with water,⁵ or causes ice to accumulate or to be thrown thereon,⁶ or in any way interferes with the natural condition of the land or the rights of landowners, its maintenance is unlawful and imposes upon those maintaining it liability for all the natural and probable consequences flowing therefrom.⁷ So, too, in the erection of dams, lower owners are restricted to the erection of such dams as will not set back the water upon the wheels of upper mill-owners, or in any wise interfere with the free and unobstructed operation thereof.⁸ He cannot substract from the power of an upper owner by throwing the water back upon him.⁹ Nor does it make any difference whether the upper owner has a mill upon his premises or not,¹⁰ and if the water is set back upon the premises of one who has a mill site, even though the lands are not overflowed, the backing of the water creates an actionable injury.¹¹

¹ Hill v. Ward, 2 Gilman (Ill.) 285; Haas v. Chaussard, 17 Tex. 588.

² Kounsalar v. Ward, Gilmer (Va.) 127; Rhodes v. Whitehead, 27 Texas, 304.

³ Bassett v. Company, 48 N. H. 573; Trustees v. Youmans, 50 Barb. (N. Y. S. C.) 328; Johnstone v. Roane, 8 Jones' (N. C.) Law, 523; Barron v. Lundry, 15 La. An. 681; Hooper v. Wilkinson, id. 497.

⁴ Payne v. Taylor, 3 A. K. Marsh. (Ky.) 328; Neil v. Henry, 1 Meigs (Tenn.) 17.

⁵ Pixley v. Clark, 25 N. Y. ; 35 id. 579.

⁶ Smith v. Agawam Canal Co., 2 Allen (Mass.) 355.

⁷ Amoskeag Co. v. Goodale, 46 N. H. 58.

⁸ Graver v. Scholl, 42 Penn. 67; Waring v. Martin, Wright (Penn.) 281; Shreve v. Voorhees, 2 Green's Ch. (N. J.) 25; Thompson v. Crocker, 9 Pick. (Mass.) 59; Good v. Dodge, 3 Pittsburgh (Penn.) 557; Ripka v. Sargeant, 7 S. & R. (Penn.) 9; Pixley v. Clark, 35 N. Y. 525; Stout v. McAdams, 2 Scam. (Ill.) 67.

⁹ Good v. Dodge, ante.

¹⁰ Stout v. McAdams, ante.

¹¹ Amoskeag v. Goodale, 48 N. H. 56.

SEC. 255. *Precautions to be adopted.*—In the erection of a dam, the person erecting it is bound to regard the character of a stream, and the incidents of the locality, and if it is subject to extraordinary and violent freshets, even though occurring only at intervals of several years, he is bound to construct his dam of sufficient strength to resist such freshets, and, failing in that, he is liable for all the damages that ensue.¹ The restriction imposed by law upon mill-owners in the erection of dams, is, that they must not essentially injure those above or below them in the use of the stream, or, as stated in a recent well-considered case in New Hampshire,² “so as not *sensibly* and *injuriously* to affect the rights of other mill-owners.”

SEC. 256. *Prescriptive rights.—How acquired.*—Prescriptive rights by long user of the water in a particular way may be acquired, and when acquired are added to the natural right, and to the extent of such increase, are a complete defence to actions for injuries resulting from a use of the water in excess of the natural right. Prescriptive rights may not only be acquired against riparian owners either above or below him on the stream, but also against mill-owners upon the same dam. Thus one mill-owner who has the right to use a certain quantity of water from the pond by grant, and in a certain way, or at certain times of the day, may acquire the right by twenty years' adverse use in larger quantities, for a different purpose or at a different time, to use the water in a manner entirely different from the terms of his grant. But in order to acquire a prescriptive right, his use must be adverse, open, continuous, uninterrupted and as of right, and with the knowledge and acquiescence of the owner of the estate affected thereby.³ Thus it is held that when one has maintained a dam at a given height for twenty years, this raises the presumption of a grant to maintain it at that

¹ Gray v. Harris, 107 Mass. 492.

² Norway Plains Co. v. Bradley, 52 N. H. 86.

³ Yard v. Ford, 2 Wm. Saunders, 175, 6 note; Parker v. Foot, 19 Wend. (N. Y.) 309; Luce v. Carey,

24 id. 451; Stokes v. Appomattox Co. 3 Leigh (Va.) 818; Watkins v. Peck, 13 N. H. 360; Thomas v. Marshfield, 13 Pick. (Mass.) 240; Winnipiseogee Lake Co. v. Young, 40 N. H. 420.

height in a state of perfect repair. But, if during that period it has not flooded the lands above, if, when repaired, it produces that result, the dam is a nuisance, and an action lies for all injuries produced by flooding the upper land the same as though it was a new dam.¹

SEC. 257. *Extent of right acquired.*—*Gilford v. Lake Co.*—But this must be understood as subject to the condition that the use of the water in a particular way, in order to confer a prescriptive right, must not only be “*adverse under a claim of right, exclusive, continuous and uninterrupted,*” but such use must be *known to, and acquiesced in, by the owner of the rights affected thereby*, and the burden of proving these conditions is upon the person asserting the claim.² But a use of water for however long a period, lacking in either of these elements, confers no prescriptive right.³ In a New Hampshire case, *SMITH, J.*, in delivering the opinion of the court, thus laid down the rule: “Merely maintaining a dam for twenty years, without thereby raising the water on the plaintiff’s land often enough to give notice that they claimed the right to flow it, would not give the defendant a prescriptive right to flow plaintiff’s land as high as it *could* be flowed by means of that dam. The mere erection and maintenance of the dam did no injury to the plaintiffs, and furnished them

¹ *Stiles v. Hooker*, 7 Cow. (N. Y.) 266; *Russell v. Scott*, 9 id. 279; *Metz v. Dorney*, 25 Penn. St. 519. But see *Jackson v. Harrington*, 2 Allen (Mass.) 242; *Norway Plains Co. v. Bradley*, 52 N. H. 108; *Winnipisogee Lake Co. v. Young*, 40 id. 420; *Burnham v. Kempton*, 44 id. 78. See *Colwell v. Thayer*, 5 Met. (Mass.) 253; *Ray v. Fletcher*, 12 Cush. (Mass.) 200; *Hinds v. Schultz*, 39 Barb. (N. Y. S. C.) 600. But the right will only be co-extensive with the use, and, though the dam has been maintained at a given height for the prescriptive period, yet if during that time it has not been kept in repair, so as to set the water back upon the lands above, the owner of the dam will be liable for all damages resulting from the setting back of the water when the dam is in re-

pair beyond that what is covered by his use. *Carlisle v. Cooper*, 4 C. E. Green (N. J.) 260; *Mertz v. Dorney*, 25 Penn. St. 519.

² *Mehans v. Patrick*, 1 Jones (N. C.) 23; *Gentleman v. Soule*, 32 Ill. 279; *American Co. v. Bradford*, 27 Cal. 366; *Ealing v. Williams*, 10 Penn. St. 266; *Tracey v. Atherton*, 36 Vt. 514; *Evans v. Daner*, 7 R. I. 311; *Mitchell v. Parks*, 26 Ind. 354; *Finicum Fishing Co. v. Carter*, 61 Penn. St. 40; *Olney v. Gardner*, 4 M. & W. 406; *Arnold v. Stevens*, 21 Pick. (Mass.) 106; *Watkins v. Peck*, 13 N. H. 360; *Luce v. Corley*, 24 Wend. (N. Y.) 451.

³ *American Co. v. Bradford*, 27 Cal. 366; *Gilford v. Lake Co.*, 52 N. H. 262.

⁴ *Gilford v. Lake Co.*, 52 N. H. 262.

no ground of action against the defendants. It is not the right to erect or maintain a dam upon their own land that the defendants seek to establish by prescription, for that they have already. They may build and maintain a dam on their own land at any height; unless it pens back the water on the plaintiff's land, the plaintiffs could not complain or maintain an action against them for an invasion of their right. *It is not the height of the dam, but of the water, which does the injury.* It is not the height of the dam but of the water of which the plaintiffs complain. * * * To gain a prescriptive right there must be something more than a mere *intention* to do some act on the plaintiff's land. *The land owners on the shores of this lake are not bound to make annual pilgrimages to Lake village to measure the dam of the Lake Co., and employ an engineer to calculate whether, if kept tight and full, it can be used to throw water on their land.*"¹ The fact that the dam owner exercised the right of flowing the land as often as he chose, is not the test. The question is did he exercise the right so often, and in such a way, as to invade the rights of the plaintiff, and as to operate as a notice of the extent of his claim? So where a mill-owner has used flush boards in dry times for the period of twenty years, taking them off upon a rise of water, he does not thereby acquire a right to maintain them upon the dam. In order to acquire a prescriptive right to the use of the water in a particular way the use must be such as is in violation of the rights of others, and such as is actionable on the part of those affected thereby, although it need not be such as to produce actual damage.*

✓ SEC. 258. **Lawlor v. Potter.**—In a New Brunswick case,*

¹ Carlisle v. Cooper, 4 C. E. Green (N. J.) 256; Stiles v. Hooker, 7 Cow. N. Y. 256; Mertz v. Dorney, 25 Penn. St. 519; Sargent v. Stark, 12 N. H. 332; Burham v. Kempton, 44 id. 78; Courtauld v. Legh, L. R., 4 Ex. 126.

² Lowe v. Carpenter, 6 Ex. 825; Carr v. Foster, 3 Q. B. 581; Lake Co. v. Young, 40 N. H. 420.

³ King v. Tiffany, 9 Com. 162; Lawlor v. Potter, 1 Hannay (N. B.)

328; Mertz v. Dorney, 25 Penn. St. 519; Carlisle v. Cooper, 6 C. E. Green, (N. J.) 578; Burnham v. Kempton, 44 N. H. 90; Carlisle v. Cooper, 4 C. E. Green (N. J.) 262. But see Hall v. Augsburg, 44 N. Y. 622; Marcy v. Shultz, 28 id. 352; Hynds v. Shultz, 39 Barb. (N. Y.) 600.

⁴ Lawlor v. Potter, 1 Hannay (New Brunswick) 328.

an interesting question was raised as to the right of a mill-owner to raise the water in dry seasons by means of flush boards, whereby the lands of supra-riparian owners were flooded, and rendered useless for the purposes of cultivation. It appeared that the defendant was the owner of a mill and dam, and during a dry time, when the stream was low, he put on logs and raised the water and overflowed the plaintiff's lands during the dry season, more than ever had been done by the original dam, so that the plaintiff was unable to cut hay from portions of his premises bordering on the stream from which he would otherwise have been able to take it. Upon the trial of the case the judge charged the jury that, if the defendant's dam had, for the period of twenty years previous to this action, been maintained at its present height, and had thus been kept up and maintained continuously for the period of twenty years, and had backed up the water so as to overflow the land above, then there could be no recovery. But that, if the defendant, by raising his dam by means of permanent or temporary devices, thereby overflowed more of the upper land, or overflowed land which had been only partially flooded before, or if the original dam overflowed the land only in a particular way, and at particular seasons of the year, any change in the dam which occasioned an overflow in a different manner, or at different or other seasons of the year, would be a nuisance, and actionable as such. The judgment was affirmed upon appeal. The use of flush boards or any devices whereby the height of the dam or the quantity of water in the pond is increased, whether in wet seasons or dry, is unlawful and a nuisance, and is actionable, even though no special damage results therefrom, because, if kept up for twenty years, a right to use them is thereby gained by prescription. But this must be qualified with the condition that the water, during the season when the flush boards or other devices are used, raises the water in the channel beyond what it would be raised at that season by the original dam.'

¹ Hynds v. Shultz, 39 Barb. (N. Y.) Cal. 407; Marcy v. Shultz, 29 N. Y. 600; Grigsby v. Clear Lake Co., 40 852; Pierce v. Travers, 97 Mass. 806.

The rule generally adopted seems to be that it is not the height of the dam that regulates and measures the rights of the parties to flood the lands of supra-riparian owners, but *the height of the water as ordinarily and usually kept in the dam when kept in repair, as dams are kept for profitable and economical use.*¹

SEC. 259. *Carlisle v. Cooper.*—In *Carlisle v. Cooper*, cited in the last note, it was held, in a case where a right to flood lands by prescription was claimed, that the fact that the *dam* had been maintained at a given height for twenty years, was not conclusive of the right of the party to maintain his dam at that height, but that it must be shown that the dam during all that time had been maintained in such a state of repair that the right of flooding would be maintained to the full height of the dam, and that where a dam had been allowed to remain in a leaky condition and out of repair for two years, so as not to amount to full assertion and maintenance of the right to the full height of the dam, those two years would not be counted as a part of the prescriptive period. A different rule would certainly be productive of fraud, and would be exceedingly oppressive, as it would enable parties surreptitiously, and without the knowledge of the owners of estates to be affected thereby, to impose burdens upon their estates, without their knowledge and without the power of resistance on their part; and would also be opposed to the fundamental principles controlling the law of prescription, which requires that the use should be *open, adverse, as of right, and continuous*, during the requisite period.

The dam must be kept in such a condition as to amount to a full exercise of the right claimed during the entire period. Merely temporary suspensions in the user, such as occur from accidental² or necessary cause,³ that are not permitted to continue for any considerable period, will not defeat the right, but a neglect to keep the dam

¹ *Carlisle v. Cooper*, 21 N. J. L. 578; *Mertz v. Dorney*, 25 Penn. St. 519; *Burnham v. Kempton*, 44 N. H. 90; *Smith v. Ross*, 17 Wis. 227.

² *Hoag v. Delorme*, 30 Wis. 504.

³ *Perrin v. Garfield*, 37 Vt. 310; *Brace v. Yale*, 10 Allen (Mass.) 443.

in such a state of repair as to fairly amount to an assertion and continuance of the right to set back the water to the full extent which the dam in a perfect state of repair would set it back, would restrict the party to a use of the water commensurate only with that which he had exercised, with the dam in the condition in which it had ordinarily been maintained.

SEC. 260. *Mertz v. Dorney*.—In a Pennsylvania case,¹ the defendant had for a period of twenty years maintained his dam at a given height, but during all that time it had been in a defective state of repair and leaky, so as not to hold and set back the water as it would have done if it had been kept tight and in repair. At the expiration of twenty years the defendant repaired and tightened his dam without increasing its height, and as a result the water was set back upon the plaintiff's land beyond what it had ever formerly been, during the twenty years, and it was held that the defendant was responsible for all damages resulting from the setting back of the water beyond what it had formerly been set back by the dam in its leaky and defective condition. It is the *use* that measures the right, and this is to be determined from the ordinary effects of the dam upon the lands above, and the condition in which the dam has been kept, together with the condition of the stream, and the uses to which it has been applied by the owner of the dam during the prescriptive period.²

SEC. 261. *Change of machinery*.—As between mill-owners, an ancient mill has no right to change its machinery, by putting in such as requires more water, or as is in any measure a nuisance to other mill-owners on the stream. The antiquity of a mill affords no protection against

¹ *Mertz v. Dorney*, 25 Penn. St. 519.

² *Murdy v. Shultz*, 39 Barb. (N. Y. S. C.) 600; *Carlisle v. Cooper*, 21 N. J. L. 587; *Pierce v. Travers*, 97 Mass. 306; *Powell v. Lash*, 64 N. C. 456; *Hoag v. Delorme*, 80 Wis. 594; *Metz v. Delorme*, 25

Penn. St. 519; *Carlisle v. Cooper*, 19 N. J. L., 260; *Darlington v. Painter*, 7 Penn. St. 478; *Burnham v. Kempton*, 44 N. H. 78; *Stiles v. Hooker*, 7 Cow. (N. Y.) 266; *Gilford v. Lake Co.*, 52 N. H. 262.

bility for injuries thus inflicted, for, as to the new wheel or other machinery, it will be treated as a new mill.¹

So, where a mill, ancient or otherwise, has been used for a particular purpose, as a saw-mill, grist-mill or paper-mill, it may not apply the water to any other class of machinery or business requiring more power to the injury of others, but it may use the same quantity of water that was formerly required in any other business, unless by grant it is specially restricted to a particular and special use.²

But when water rights are granted with specific restrictions as to the application of the water, it must be applied only in the mode specified in the grant. The restrictive clause must, however, be positive and unequivocal, and clearly import an intention on the part of the parties thereto to restrict the use of the water to a particular class of business, and that only. Thus a conveyance of a fulling-mill in these words, "together with water sufficient to operate the fulling-mill thereon standing," would not restrict the grantee to the use of the water for a fulling-mill, but would authorize the use of an equal quantity for any other purpose. But where the language of the grant is specific and clearly indicated, an intention to restrict the use of the water to a special use, as "together with water sufficient to operate the fulling-mill thereon standing *and for no other purpose*," this would restrict the use of the water to that purpose alone, and any different use would be actionable.³ Indeed *any* language in the granting clause that indicates a clear intention on the part of the grantor to limit the use of

¹ *Simpson v. Leaney*, 8 Me. 188; *Pratt v. Sampson*, 2 Allen (Mass.) 278; *Bardwell v. Ames*, 22 Pick. (Mass.) 354; *Adams v. Warner*, 28 Vt. 395; *Dewey v. Williams*, 40 N. H. 227; *Kaler v. Beaman*, 49 Me. 208; *Olmstead v. Loomis*, 6 Barb. (N. Y.) 152; *Wakeley v. Davidson*, 26 N. Y. 887; *Miller v. Lapham*, 44 Vt. 433.

² *Miller v. Lapham*, 44 Vt. 433.

³ *Tortelot v. Phelps*, 4 Gray (Mass.) 370; *Shed v. Leslie*, 22 Vt. 498; *Dishon v. Porter*, 88 Me. 289;

McDonald v. Askeny, 29 Cal. 207. But in all cases where the language of the grant will admit of its being construed as the *measure* rather than the *quality* of use, the courts will so construe it. *Adams v. Warner*, 28 Vt. 395; *Cromwell v. Selden*, 3 N. Y. 253; *Salmon v. Rudd*, 6 N. Y. 22; *Pratt v. Sampson*, 2 Allen (Mass.) 275; *Kaler v. Beaman*, 49 Me. 208; *Wakeley v. Davidson*, 26 N. Y. 887.

the water to a particular class of business or machinery will be operative to that end.¹

SEC. 262. *Ancient mills.*—In reference to what are termed ancient mills, it may be said that the mere fact that a mill is ancient and has had the entire use of the water of a stream does not confer a right upon the owners to use the water at their own convenience or as their interest may dictate, as against a new mill lower down the stream. But, when a lower mill is erected, the ancient mill is bound to a reasonable and proper use of the water in reference to the rights of the new mill, and any *unreasonable* detention or use of the water is a nuisance to the lower mill, and actionable the same as though the upper mill was also a new one.²

SEC. 263. *Effect of prior use.*—It may be understood as a settled rule of law that priority of occupation, in the use of water, by a mill-owner, gives him no such rights as will deprive those above or below him on the stream from also turning the water to beneficial purposes. He simply acquires the right to use the water in its natural flow, and, while an owner above or below him cannot do any act in violation of his rights by unreasonably detaining it from his mill on the one hand or setting it back upon his wheels upon the other, neither can he make an unreasonable use of the water to their injury.³ It may be said, however, that he who is first in point of time in turning the water of a stream to a beneficial use has the right to water sufficient to operate his mill, even though the effect be, in a reasonable use thereof, to destroy the

¹ Strong v. Benedict, 5 Conn. 219.

² Barrett v. Parsons, 10 Cush. (Mass.) 387.

³ Martin v. Bigelow, 2 Aiken (Vt.) 184; Gould v. Boston Duck Co., 18 Gray (Mass.) 442; Thurber v. Martin, 2 id. 394; Tyler v. Wilkinson, 4 Mason (U. S.) 397; Davis v. Getchell, 50 Me. 604; Springfield v. Harris, 4 Allen (Mass.) 494. In California it is held, if the first appropriator only

takes a part of the water, or only uses it during certain times, another may take the surplus or use it for the balance of the time. Smith v. O'Hara, 43 Cal. 371; Thorp v. Freed, 1 Mon. T. 651; Columbia Mining Co. v. Haller, id. 296. In Maine it is held that as between owners of dams on the same stream he has the best right who is first in point of time. Lincoln v. Chadborne, 56 Me. 197.

value of a lower privilege.¹ It is not every riparian owner who may erect a dam upon the stream, nor indeed can it ever be lawfully done, when the dam will raise the water beyond its natural surface, to the injury of other owners.²

SEC. 264. *What is mill seat.*—A dam may be erected, whether upon a fall or not, so as to raise the water up to the level of his own land, but no further.³ If there be no fall upon the land, and no method by which a mill can be propelled by the water, there is no mill seat, and no right on the part of the riparian owner to pen back the water to the injury of others, for the law will not recognize the right of interfering with the natural flow of a stream, to the injury of others, except when the water is applied to a beneficial purpose.⁴ No rights are acquired by a frivolous use of water, as by the erection of a dam for the simple purpose of turning a wheel to which no machinery is attached, and which served no useful end or beneficial purpose.⁵ Where water flows through land upon what is termed a “*dead level*,” with no perceptible fall, it can hardly be said that a man has a “*mill seat*,” or “*mill privilege*,” within the meaning of the law. But if there is a point upon his land to which the water can be directed with sufficient momentum and fall to be beneficially applied as a power, the owner may thus divert it, if he can and does again return it to its original channel before it leaves his land; but he cannot divert the water entirely from its natural channel for any purpose.⁶

¹ Hatch v. Dwight, 17 Mass. 289; Chandler v. Howland, 7 Gray (Mass.) 348; Thurber v. Martin, 2 id. 394; Smith v. Agawam Canal Co., 2 Allen (Mass.) 355. But see King v. Tiffany, 9 Conn. 162; Butman v. Hussey, 12 Me. 407; Pool v. Lewis, 41 Ga. 168; Omelvaney v. Jaggars, 2 Hill (N. Y.) 634.

² Colwell v. May's Landing Co., 19 N. J. L. 248.

³ McCalmont v. Whittaker, 3 Rawle (Pa.) 84; Brown v. Bush, 45 Penn. St. 66; Rhodes v. Whitehead, 27 Tex. 810.

⁴ Stackpole v. Curtis, 82 Me. 882; Russell v. Scott, 9 Cowen (N. Y.) 281.

⁵ Jackson v. Vermilyea, 6 Cow. (N. Y.) 677; Weaver v. Eureka Co., 15 Cal. 371.

⁶ Davis v. Fuller, 18 Vt. 178; Van Hoesen v. Coventry, 10 Barb. (N. Y. S. C.) 518; Binney's Case, 2 Bland's (Md.) Ch. 99; Bardwell v. Ames, 23 Pick. (Mass.) 333; Crittenden v. Field, 8 Gray (Mass.) 621; Samuels v. Bradford, 25 Wis. 327; Brace v. Yale, 10 Allen (Mass. 447; Bealey v. Shaw, 6 East, 205

SEC. 265. *Artificial watercourses.*—The right of a riparian proprietor is limited to natural streams, and does not attach in the case of artificial cuts or drains.¹ But a watercourse, though artificial, may have been originally made under such circumstances and have been so used as to give all the rights that the riparian proprietors would have had if it had been a natural stream; and therefore, in an action by one riparian proprietor against another, for the pollution and diversion of a watercourse, it is a misdirection to tell the jury that, if the stream were artificial and made by the hand of man, the plaintiff could have no cause of action.² The flow of water from a drain made by a land owner in his own land for the purposes of agricultural improvements for twenty years, does not give a right to the neighbor, so as to preclude the landowner from altering the level of his drain for the improvement of his land.³ No right can be acquired to the use of an artificial watercourse made for a particular and temporary purpose.⁴ In one case it was held that in the absence of a special custom, artificial watercourses were not distinguished in law from natural ones; and that a title might be gained by twenty years' user as well to the former as to the latter.⁵ But that case was unsatisfactory, and has since been overruled.⁶ All the authorities from the Digest downwards show that there is a difference in this respect between a natural watercourse.⁷ Nevertheless, an artificial watercourse or drain may have been originally made for permanent purposes, and under such circumstances, and have been since used for such a period as to give all the rights that the riparian proprietors would have had if it

Procter v. Jennings, 6 Nev. 87; Baldwin v. Calkins, 10 Wend. (N. Y.) 167; Rex v. Trafford, 1 B. & Ad. 874; Lord v. Com'rs of Sidney, 12 Moore's P. C. 478.

¹ Sampson v. Hoddinott, 1 C. B. N. S. 560; 3 id. 596; Wardle v. Brocklehurst, 1 E. & E. 1058; Gale, 262.

² Sutcliffe v. Booth, 82 L. J. Q. B. 136.

³ Greatrex v. Hayward, 8 Exch.

291; Wood v. Wand, 8 Exch. 778.

⁴ Arkwright v. Gell, 11 Exch. 610.

⁵ Magor v. Chadwick, 11 Ad. & El. 571.

⁶ Sampson v. Hoddinott, 1 C. B. 590, 606.

⁷ Id. 606; Arkwright v. Gell, 5 M. & W. 208; Acton v. Blundell, 12 M. & W. 324; Wood v. Wand, 8 Exch. 778; Greatrex v. Hayward, 8 Exch. 291.

had been a natural stream.¹ The plaintiff and the defendant occupied contiguous portions of land. For more than forty years, and as far back as living memory went, the occupiers of the plaintiff's land had been in the habit of passing over the defendant's land to a brook which lay on the other side of that land and of damming up the brook when necessary, so as to force the water into an old artificial watercourse which ran across the defendant's land to the plaintiff's land. They did this for the purpose of supplying their cattle with water whenever they wanted the water, except when the owners of the defendant's land used the water, as they did at certain seasons of the year for irrigation :—held, that upon this evidence the jury was warranted in inferring an user, as of right, by the occupiers of the plaintiff's land, of the easement on the defendant's land ; and that, for the interruption of such easement, the plaintiff might maintain an action against the defendant.²

SEC. 266. *Implied grant or reservation of drains, &c.*—Where the owner of two or more adjoining houses sells and conveys one of them to a purchaser, such house is entitled to the benefit, and is subject to the burthen, of all existing drains communicating with the other house, without any express reservation or grant for that purpose ; an *implied* grant or reservation (as the case may require) will be presumed in the absence of express words to the contrary. It makes no difference in this respect that the purchaser did not know of the drains under his house, if he might have ascertained their existence upon a careful inspection by a person ordinarily conversant with the subject, and it will be deemed his own fault if he did not do so at the time of his purchase.³ Two properties, which adjoined, were originally possessed by the same owner, in one of which was a cesspool and a drain to carry the water from the adjoining property, which was a tan-yard. The owner afterwards sold the property to different per-

¹ *Sutcliffe v. Booth*, 32 L. J. Q. B. 136.

² *Beeston v. Weate*, 5 E. & B. 986.

³ *Pyer v. Carter*, 1 H. & N. 916. But see *contra*, *Suffield v. Brown*, (on appeal), 33 L. J. Ch. 249.

sons, and the conveyances contained no reference to the drain and cesspool :—held, that there was an implied grant of the easement of the cesspool in the conveyance of the tan-yard.¹ Where the plaintiff excepts and reserves to himself the right to make and use a sewer in land conveyed by him to the defendant, whereby the *exclusive* use of such sewer is reserved to the plaintiff, he may maintain an action against the defendant for opening and using the sewer.² So where the defendant grants to the plaintiff the use of water, subject to a proviso for the use thereof by the defendant, the plaintiff may maintain an action on the deed for the abuse of such reservation by the defendant.³

SEC. 267. *License to make or use drains, &c.*—A parol license to make a drain or watercourse *in the land of the licensor* will not, even after it has been fully executed at the expense of the licensee, confer any right or title on him to have the use and benefit of the drain or watercourse free from obstruction ; nor enable him to maintain any action against the licensor for obstructing such drain or watercourse without notice.⁴ But a license attached to a valid grant of real or personal property is irrevocable, it being a license coupled with an interest.⁵ No man can derogate from his own grant, nor can any person claiming through or under him. But a license connected with an invalid grant is a mere license (whether under seal or not) and may be revoked at any time,⁶ either expressly or by implication.⁷ A parol license to erect a skylight, or a weir, or other easement *on the land of the licensee* cannot be revoked, after it has been executed at the li-

¹ Ewart v. Cochrane, 5 L. T. N. S. 1, H. L. But see Suffield v. Brown, *supra*.

² Lee v. Stevenson, E. B. & E. 512.

³ Rawston v. Taylor, 11 Exch. 369.

⁴ Hewlins v. Shippam, 2 R. & C. 221 ; Cocker v. Cowper, 1 C. M. & R. 418 ; Greenslade v. Halliday, 6 Bing. 379 ; Mason v. Hill, 5 B. & Ad. 1 ; Wood v. Leadbitter, 13 M. & W. 838 ; Adams v. Andrews, 15 Q. B. 284 ; Taplin v. Florence, 10

C. B. 744 ; Roffey v. Henderson, 17 Q. B. 574 ; Roberts v. Rose, 3 H. & C. 162 ; affirmed in error, 4 H. & C. 103 ; L. R., 1 Ex. 82.

⁵ Wood v. Manley, 11 Ad. & El. 34 ; Feltham v. Cartwright, 5 Bing. N. C. 569.

⁶ Fentiman v. Smith, 4 East, 107 ; Wood v. Leadbitter, 13 M. & W. 823 ; Taplin v. Florence, 10 C. B. 744.

⁷ Roffey v. Henderson, 17 Q. B. 574.

licensee's expense, so as to render it necessary for the licensee to incur further expense in removing it.'

SEC. 268. *Extinguishment or suspension of drains, &c.*—Nothing of *absolute necessity* to a messuage or other building is extinguished by unity of ownership or possession, as a gutter in *alieno solo* to carry off water, &c., or a watercourse, or a way of necessity. They are merely *suspended as easements* during the joint ownership or possession, and will revive whenever the building or the land is conveyed to another.' But it is otherwise with respect to ways not of necessity or other easements not of a continuous nature.'

SEC. 269. *Underground water.*—The principles which regulate the rights of owners of land in respect to water flowing in *known and defined channels*, whether upon or below the surface of the ground, do not apply to underground water which merely percolates through the strata in no known channels.' The owner of land through which water flows in a subterranean course has no right or interest in it which will enable him to maintain an action against a landowner who, in carrying on mining operations on his own land in the usual manner, drains away the water from the land of the first-mentioned owner, and leaves his well dry.' The owner of a mill on the banks of a stream cannot maintain an action against a landowner who sinks a deep well on his own land, and by pumps and steam-engines diverts the underground water which would otherwise have percolated the soil and flowed into the river, by which for more than sixty

¹ Winter v. Brockwell, 8 East, 308; Liggins v. Inge, 7 Bing. 682; Harvey v. Reynolds, 12 Price, 724.

² Pheysey v. Vicary, 16 M. & W. 485.

³ Pyer v. Carter, 1 H. & N. 916; Dodd v. Burchell, 1 H. & C. 113; Worthington v. Gimson, 2 E. & E. 618; Pearson v. Spencer, 1 B. & S. 571; 8 B. & S. 761; Polden v. Bastard, 4 B. & S. 258; affirmed in error, L. R., 1 Q. B. 156.

⁴ Chasemore v. Richards (in error), 2 H. & N. 168; 7 H. L. Cas. 349; Reg. v. The Metropolitan Board of Works, 3 B. & S. 710; New River Co. v. Johnson, 29 L. J. M. C. 93; Ibbotson v. Peat, 8 H. & C. 644.

⁵ Acton v. Blundell, 12 M. & W. 324, 348; New River Co. v. Johnson, 29 L. J. M. C. 93; Galgay v. Great Southern and Western R. Co., 4 Ir. Com. L. R. 456) Q. B.

years the mill was worked.' "If a man has the misfortune to lose his spring by his neighbor digging a well, he must dig his own well deeper.'" A mine owner may work his coal in the manner most advantageous to himself, and remove a bar of coal therein to obtain the coal in such bar, although in consequence of his so doing, the water floods an adjoining mine.' But he has no right to pollute the water flowing through swallets in his own mine which communicate with a stream running into an adjoining mine.' And after a demise of certain closes and all streams of water therein, reserving to the lessor all mines and minerals, with power to win and work the same, the lessor or his assigns cannot work the mines so as to cut off the springs in the closes demised.'

SEC. 270. *Surface water.*—A landowner has a right to appropriate surface water which flows over his land *in no definite channel*, although the water is thereby prevented from reaching a watercourse which it previously supplied.' He has an unqualified right to drain his land for agricultural purposes in order to get rid of mere surface water, the supply of the water being casual and its flow following no regular or definite course; and a neighboring proprietor cannot complain that he is thereby deprived of such water, which otherwise would have come to his land.' But where the water from a spring *flowing in a gully or natural channel* to a stream on which was a mill, the spring having been cut off *at its source* and the water received into a tank as it rose from the earth, by the license of the owner of the soil on which the spring rose; held, that an action lay by the millowner against the person so abstracting the water.'

¹ *Chesemore v. Richards* (in error) 2 H. & N. 168; Reg. v. The Metropolitan Board of Works, 8 B. & S. 710; *New River Co. v. Johnson*, 29 L. J. M. C. 93; *Ibbotson v. Peat*, 8 H. & C. 644, 650.

² *Per BRAMWELL, B.*, in *Ibbotson v. Peat*, 8 H. & C. 650.

³ *Smith v. Kendrick*, 7 C. B. 515; and see *Fletcher v. Rylands*, 8 H. & C. 774; *Baird v. Williamson*, 15 C. B. N. S. 376.

⁴ *Hodgkinson v. Ennor*, 4 B. & S. 229.

⁵ *Whitehead v. Parks*, 2 H. & N. 870.

⁶ *Broadbent v. Ramsbottom*, 11 Exch. 602.

⁷ *Rawston v. Taylor*, 11 Exch. 369; Reg. v. The Metropolitan Board of Works, 8 B. & S. 710.

⁸ *Dudden v. Guardians of Clutton Union*, 1 H. & N. 627.

The flow of water for twenty years from the eaves of a house cannot give a right to a neighbor to have it continue to flow,¹ although the owner of the house may, by such user, acquire the right to have it flow there.² It will be understood that the rights and liabilities of a tenant, unless qualified or restrained, are the same as the landlord.

SEC. 271. **Lateral support.**—Every landowner has a right to have his soil preserved intact, as against its own weight and the ordinary effects of the elements; and an adjoining owner who excavates so near to the line of his neighbor's land as to cause it to crumble or fall away, is liable for all the damages ensuing therefrom; but if the character of the adjoining soil is such that it will and does sustain its own weight, and the natural pressure thereon by the power of its own coherance, without the aid of the surrounding soil, the adjoining owner may remove his soil without liability to damage therefor. No damage is recoverable except for an actual disturbance of the integrity of the soil.³ The right to support extends only to the soil itself, and does not include anything placed thereon that sensibly increases the pressure,⁴ nor does it exist after the owner has removed the soil, and substituted a wall or other artificial substitute therefor.⁵ This right to support from neighboring soil exists *ex jure natural*, and not as an easement,⁶ although it par-

¹ Wood v. Waud, ante.

² Thomas v. Thomas, 2 C. M. & R. 34.

³ Wilde v. Minsterley, Pasch. 384; Farrand v. Marshall, 19 Barb. (N. Y.) 380; 21 id. 409; Foley v. Wyeth, 2 Allen (Mass.) 121; Thurston v. Hancock, 12 Mass. 220; McGuire v. Grant, 25 N. Y. Eq. 356; Shrieve v. Stokes, 8 B. Mon. (Ky.) 453; La Sala v. Holbrook, 4 Paige Ch. (N. Y.) 167; Vt. Centl. R. R. Co. v. Richardson, 25 Vt. 465; Moody v. McClelland, 39 Ala. 45; Humphries v. Brogden, 12 Q. B. 739; Dugdale v. Robertson, 3 K. & J. 695; Proud v. Bates, 34 L. J. (Ch.) 406, and indeed all the English cases are to the same effect.

⁴ Stansell v. Jollard, 1 Selw. N. P. 444; Wyatt v. Harrison, 3 B. & Ad. 871; Partridge v. Scott, 3 Mees. & Wels. 220; Humphries v. Brogden, 12 Q. B. 744; Solomon v. Vinter's Co., 4 H. & N. (Exch.) 585; Murchie v. Black, 34 Law J. (C. P.) 337.

⁵ Wilde v. Minsterley, ante; Thurston v. Hancock, 12 Mass. 220; La Sala v. Holbrook, 4 Paige's Ch. (N. Y.) 167; Richardson v. Vermont Central Railroad Co., 25 Vt. 465, opinion of BENNETT, J.; Hay v. Cohoes Co., 2 N. Y. 109.

⁶ Rowbotham v. Wilson, 8 E. & B. 136; Bonomi v. Backhouse, E. L. & Eq. 622; Thurston v. Hancock ante.

takes of the nature of an easement, and is frequently classed as such both by elementary writers and courts.¹ BRAMWELL, B., in an English case,² says; "I think it inaccurate to say that the plaintiff is claiming any kind of easement, qualified or otherwise: *an easement seeming to me to be something additional to the ordinary rights of property.*" But it will not be profitable for us to discuss this question here. The right exists, and whether it is to be regarded as an easement or a natural right, is a question of small consequence. It must not be understood that the right to support ceases to exist when the land is encumbered with a building or other erection. It is true that the right extends only to the soil itself, but it is by no means restricted, as is stated by some of the elementary writers, to "the land in its natural state."³ It exists only as to the soil, but, however the soil may be incumbered with buildings or other structures, unless they contributed directly to the injury, a right of action exists for an interference with the right, precisely as much with as without the buildings. Indeed, I think the cases will justify the broad statement, that in actions for injuries to the right of support, where liability is sought to be avoided, on the ground that there are erections on the plaintiff's land that contributed to the injury, it is incumbent upon the defendant to show that the injury would not have resulted except for such erections.⁴

A distinction exists between an injury to the soil and an injury to the wall or other structure erected in lieu of it. In the case of a building erected upon the surface to the soil where no excavation has been made for a foundation, a removal of the support of the adjoining soil would be actionable, notwithstanding the presence of the building, if any injury to the soil thus left unsupported followed, even though the excavation was made in the

¹ Gale v. Easements, 148.

² Rowbotham v. Wilson, ante.

³ Washburn on Easements, 431, Gale on Easements, 311.

⁴ Foley v. Wyeth, 2 Allen (Mass.) 181; Hunt v. Peake, Johns. (Eng.)

705; Thurston v. Hancock, 12 Mass.

220; Brown v. Robins, 4 H. & N. (Exch.) 186.

⁵ Foley v. Wyeth, ante; Brown v. Robins, ante.

exercise of the highest care and skill possible, In such cases, where no excavation has been made and no artificial support has been substituted for the soil, the adjoining owner excavates so near to his neighbor's line as to disturb his soil at his peril. It is an interference with a natural right, and a nuisance, and liability attaches whether the digging was accompanied with negligence or not.¹ If by the increased weight imposed upon the soil by the building the damage is enhanced, this does not defeat liability for such damages as would have arisen if no building had been placed there, but only such as are the direct results of the pressure of the building. This precise question has not been directly decided, but the later authorities disclose a tendency of the courts in that direction.² But where the owner of an adjoining lot excavates up to the limits of his line, and replaces his soil with an artificial structure, the right of support that existed in favor of the soil, ceases to exist, and the adjoining owner may, in the exercise of reasonable care, excavate to any depth upon his own land, even though by so doing he withdraws the support from such structure, and causes it to fall into the pit, and no action lies against him therefor.³

The degree of care required of a person excavating upon his own premises, near the foundation of another's building, cannot be accurately defined, but must necessarily depend upon the circumstances of each case. The character of the soil, the condition of the wall and building, the depth of the excavation, and all those conditions

¹ *Thurston v. Hancock*, 12 Mass. 220; *Hay v. Cohoes Co.*, 2 N. Y. 159; *Tremain v. Cohoes Co.*, id. 164; *Stroyman v. Knowles*, 6 H. & N. (Exch.) 454; *Hamerv. Knowles*, id. 459.

² *Richardson v. Vermont Central Railroad Co.*, 25 Vt. 465. In this case BENNETT, J., says: "If there is any error in the decision of the case in the 12th Mass. (*Thurston v. Hancock*), it is, I apprehend, to be found in the courts not discriminating between the soil that fell into the excavation

from its own inherent weight, and that which was pressed in by the building." *Foley v. Wyeth*, 2 Allen (Mass.) 131; *Brown v. Windsor, C. & J.* 20; 2 *Dane's Ab.* 717; *Farrand v. Marshall*, 19 Barb. (N. Y. Sup. Ct.) 380.

³ *Wilde v. Minsterley*, ante; *Thurston v. Hancock*, ante; *Panton v. Holland*, 17 John. (N. Y.) 92; *Rockwell v. Wilson*, 11 Cush. (Mass.) 221; *Dodd v. Holme*, 1 Ad. & El. 493. See cases previously cited.

that a man of ordinary prudence would observe.¹ The better criterion by which to determine the question of liability would seem to be, that if the mere exercise of a lawful right to remove the soil upon his own premises occasioned the fall of the structure, no liability exists; but if the fall is occasioned by the manner in which it is removed, then liability attaches for all the consequences of the act.² The safest course to pursue would be for the party excavating, to give the other party notice of the fact that he intended making an excavation, and thus give him an opportunity to shove up or otherwise protect his building. There must be an absence of negligence or unskillfulness and of improper motive.³ There can be no negligence imputed, except as to structures that are visible or known to the party causing the excavation to be made; and the degree of care to be used is in view of the circumstances known to him.⁴ The test of liability is not whether the party has used such care as a prudent man would use if all the loss and damage was his own, nor whether he has used such care as a prudent man skilled in such business would have used. Nor can he shield himself from liability upon the ground that he followed the directions of a person skilled in such matters, but the decisive question is, was he guilty of negligence in view of the circumstances of the case.⁵ Was the work managed and executed with such care as a man of ordinary prudence usually exercises in the management of his business.⁶

SEC. 272. *Subjacent support.*—There are frequently two freeholds in the same estate, one in the surface, and

¹ *Panton v. Holland*, 17 Johns. 92; *McGuire v. Grant*, 1 Dutch. (N. J.) 856; *Rockwood v. Wilson*, 11 Cush. (Mass.) 221; *Charles v. Rankin*, 21 Mo. 566; *Foley v. Wyeth*, 2 Allen (Mass.) 131; *Shrieve v. Stokes*, 8 B. Mon. (Ky.) 453; *Massey v. Gadyer*, 4 C. & P. 161; *Smith v. Kendrick*, 7 C. B. 575.

² *Dodd v. Holme*, 1 Ad. & El. 493; *Trower v. Chadwick*, 3 Bing. N. C. 334; *Smith v. Kendrick*, 7

C. B. 515; *Thurston v. Hancock*, 12 Mass. 220; *La Sala v. Holbrook*, 4 Paige's Ch. (N. Y.) 169; *Gale on Easements* (3d Lond. ed.), 349; *Walters v. Pfiel*, *Moody & M.* 364.

³ *McGuire v. Grant*, 1 Dutch. (N. J.) 861.

⁴ *Chadwick v. Trower*, 3 Bing. N. C. 334.

⁵ *Charles v. Rankin*, 22 Mo. 556.

⁶ *Smith v. Hardestry*, 31 Miss. 411.

another in the minerals that lie beneath it. These conflicting estates, of course, arise from a conveyance of the lands, reserving the mines, quarries, &c. The rights of the several owners depend largely, of course, upon the provisions of the conveyances under which they hold. But when there is a simple reservation, from the conveyance of the surface, of the minerals, and right to work or mine them, and no express right is reserved to produce a subsidence of the surface if necessary in the working of the mines, the owner of the minerals is bound at his peril not to cause a subsidence of the soil, even though without doing so he cannot work the mines at all, and if he does weaken the support of the upper soil, so that it in any measure subsides, he is responsible for all the consequences, irrespective of the question as to whether or not he was negligent in his operations. Indeed, the question of negligence is not involved, for, although he was in the exercise of the highest degree of skill, if the soil subsides he is responsible for the damages;¹ and a custom of the country, as between the owner of the surface and the owner of the mines to cause a subsidence of the surface, if necessary to the working of the mines, will not shield the mine-owner from liability, and has been held to be bad.² A mere reservation of the minerals and a right to dig for the same and to work the mines, does not confer any power to interfere with the proper support of the surface.³ Such a reservation is construed as merely giving a right to take out the minerals so far as they can be taken without injury to the surface.⁴

¹ Wakefield v. Duke of Buccleugh, L. R. 4 Eq. Cas. 618; Humphries v. Brogdon, 15 Jur. 124; Harris v. Ryding, 5 M. & W. 60; Smart v. Morton, 5 E. & B. 80; Richards v. Harper, L. R., 1 Exchq. 199; Hamer v. Knowles, 6 H. & N. 458.

² Wakefield v. Duke of Buccleugh, L. R. 4 Eq. Cas. 624; L. R., 4 H. L. 377; Hext v. Gill, L. R. 7 Eq. Cas. 699.

³ Smart v. Morton, ante; Bell v. Wilson, L. R. 7 Eq. Cas. 699.

⁴ Hext v. Gill, ante; Smart v. Morton, ante. In the first case cited there was a conveyance to the plaintiff, with a reservation to the defendants of all the mines and minerals therein, and a right of entry to work the mines. There was a large quantity of china clay upon the premises, which the defendant claimed the right to take out of the land under his reservation of minerals, but which could not be taken out without injury to the surface. The court held that

In one case,¹ it was held that where lands had been improved and were covered with buildings, even a grant to let down the surface would be regarded as repugnant, and rejected as absurd. And that decision was afterward supported in the House of Lords.² In another case,³ there was a grant with covenants against liability for the subsidence of the surface in the working of the mines; but the court held that this covenant did not run with the land. In several other cases,⁴ it was held that stipulation as to the manner of working the mines, and for compensation for all injuries to the surface resulting therefrom, did not deprive the surface owner of his right to support from the mineral strata, or justify the owner of the mines in depriving him of it. To summarize, it may be said that the surface has a right to support: that is a part of the freehold, and not an easement; that the mine-owner can only work so far as is consistent with this right, and

the clay was embraced in the reservation, but that the defendant having neglected to reserve the right of interfering with the surface by the operations of mining, the power could not be implied from the mere fact that a reservation had been made. That the reservation of minerals, with the right to work the mines, could only be construed as giving a right to take out the minerals, if that could be done without causing a subsidence of the surface, and restrained the defendant from taking out the clay in any manner that would injure the surface. In *Smart v. Morton* there was a reservation of the minerals in the land, with power "to seek, work and win the same in any part of the said premises, and to drive drift or drifts, make water-gate or water-gates, or use any other way or ways for the better and more commodious working or winning the same, in the said hereby granted or intended granted premises, or any part of the same." A verdict having been rendered in favor of the plaintiffs, upon hearing in Exchequer, LORD CAMPBELL, C. J., said: "The simple reservation of the minerals does not deprive the grantee of the surface of the

right of support from the minerals, and the defendant must rely upon the supposed power reserved for the working of the minerals." The judgment of the lower court was affirmed. So in *Bell v. Wilson* the minerals were reserved, and it was held that certain stones in the soil were embraced under the reservation; but, although power to work and take out the minerals was reserved in the grant of the surface, yet the lord justices held that, as the stone could not be taken out except by quarrying, and a consequent destruction of the surface, the defendant, under a reservation of power to take out the minerals, without an express reservation of a right to let down or destroy the surface, would not be justified in injuring the surface.

¹ *Hilton v. Lord Granville*, 5 Q. B. 781.

² *Marquis of Salisbury v. Gladstone*, 4 H. L. C. 692.

³ *Richards v. Harper*, L. R. 1 Exch. 199.

⁴ *Humphries v. Brogden*, 1 Eng. Law. & Eq. 890; *Harris v. Ryding*, 5 M. & W. 60; *Roberts v. Haines*, 7 E. & B. 625; also 6 id. 643.

⁵ *Backhouse v. Bonomi*, 9 H. L. C. 503.

is liable if he violates it;¹ and that the right of support is independent of the nature of the strata, and in no sense dependant upon the fact that it cannot be worked without injury to the surface. This is the mine-owner's misfortune, and does not in any sense impair the surface owner's right.² The highest care and skill in the working of the mine is no defence whatever, if injury results to the surface; and negligence need not be proved, even though it is alleged in the declaration.³ The degree of support must be in accordance with the present or the intended use of the property,⁴ and a custom of the country will not uphold an injury thereto.⁵ But the right *may* be waived by grant, or by *express* reservation of the right to interfere with it; but the language must be such as clearly to import the power granted or reserved.⁶ The right exists only to the extent necessary to prevent a subsidence of the surface; and a withdrawal of all the minerals, that does not injure the surface, is not an interference with the surface owner's rights, and is not actionable (see all the cases cited). The right is absolute to the extent only that the surface must not be injured by a withdrawal of the minerals, but if the nature of the soil is such above the minerals as not to need their support, the entire mineral strata may be exhausted.

It may be proper here to state, that a reservation of mines or minerals carries with it a right reasonably to work for the same; but there is this fact to be observed, that *mines*, according to the common and ordinary definition of the term, as well, also, as in its legal application, signifies a "way or passage underground, a subterranean duct, course or passage, whether in search of metals or to

¹ Caledonian R. R. Co. v. Sprot, 2 Macq. (Scotch) 459.

² Wakefield v. Duke of Buccleugh, 4 H. L. C. 377.

³ Hamer v. Knowles, 6 H. & N. 459; Smart v. Morton, 30 Eng. Law & Eq. 385; Hunt v. Peake, Johns. Ch. (Eng.) 704; Brown v. Robbins, 4 H. & N. 186.

⁴ Proud v. Bates, 84 L. J. (Ch.) 406; Berkly v. Shafte, 15 C. B. N. S. 79; Dugdale v. Robertson, 8 K. & J. 695.

⁵ Constable v. Nicholson, 14 C. B. N. S. 230; Wakefield v. Duke of Buccleugh, L. R., 4 Eq. Cas. 818; 4 H. & C. 377.

⁶ Earl of Cardigan v. Armitage, 2 B. & C. 297; Wakefield v. Duke of Buccleugh, 4 H. L. C. 377; Rowbotham v. Wilson, 8 H. L. C. 345; Bell v. Wilson, L. R., 4 Eq. Cas. 303; Harris v. Ryding, 5 M. & W. 69; Elliott v. R. R. Co., 10 L. C. 333; Hext v. Gill, L. R. 7 Eq. Cas. 699.

destroy fortifications, &c.,” and the word “mineral,” being derived from “mine,” signifies that which is obtained by underground working, and not that which is dug from quarries, which are wrought from the surface.¹ But while a reservation of minerals authorizes their being taken out in a reasonable manner,² yet it has been demonstrated by the cases referred to, that it only justifies their being taken when it can be done without injury to the surface. But where *quarries* are reserved, this, without any express reservation of a right to injure the surface, carries with it such right as a necessary incident, because the natural and ordinary, as well as legal, import of the word, contemplates surface-working. A *quarry* signifies a *stone pit*,³ and refers to a place *above*, rather than *under*, the ground, and the intention of the parties, in all conveyances, being gathered from the language used, the law makes this proper distinction between the reservation of a mine and a quarry.⁴ Therefore, the reservation of minerals gives no right to take them out of the earth, except where it can be done without injury to the surface; but the reservation of quarries carries with it the right to dig the surface, because that power is necessarily implied as in accordance with the intention of the parties, because it is the only method by which the stone can be taken out. The right to *subjacent* support for land, it is said, is only applicable to the land in its natural condition, unincumbered by buildings or other structures that sensibly increase the pressure thereon; but, as has previously been explained, the mere presence of a building or other structure upon the surface does not prevent a recovery for injuries to the surface, unless it is shown that the subsidence would not have occurred except for the presence of the buildings. When the injury would have resulted from the act if no

¹ Encyclopedia Metropolitana; 874; Rex v. Brettel, 8 B. & Ad. 424; Rex v. Inhabitants of Sedgely, 2 id. 65; Darrill v. Roper, 3 Drew, 294; Brown v. Chadwick, 7 Irish C. L. 701; Listwol v. Gibbings, 9 id. 228; King v. Dunsford, 2 B. & Ad. 66; Also, see briefs of BAILEY, Q. C., for plaintiffs, and

GIFFORD, Q. C., for defendant, in Bell v. Wilson, Law R., 4 Eq. Cas. 808; also opinion of TURNER, L. J., in same case.

² Earl of Cardigan v. Armitage, 2 B. & C. 197.

³ Johnson's Dictionary, *Quarry*.

⁴ Bell v. Wilson, Law R., 4 Eq. Cas. 808.

building exists upon the surface, the act creating the subsidence is wrongful, and renders the owners of the mines liable for all damages that result therefrom, as well to the building as to the land itself.¹

It is laid down in elementary books, and is to be found in the *dicta* of some of the cases, that a person may acquire a prescriptive right for the support of a building, either adjacent or subjacent.² In the first case referred to in the last note, LORD ELLENBOROUGH said: "When a man builds to the extremity of his land, and has enjoyed his building for more than twenty years, upon analogy to the rule as to the lights, he acquires a right to support, or, as it were, of leaning to his neighbor's soil, so that his neighbor cannot dig so near as to remove his support, but otherwise as to a house newly built." This *dictum* is referred to in numerous cases; but it will be observed that it is mere *dicta*, and is no part of the actual judgment in any of the cases,³ and it is exceedingly difficult to see how any *prescriptive* right can thus be created. A builds a house upon his own land, adjoining the lands of B; in so doing he is in the exercise of a lawful right, and no right of action accrues against him in favor of B, for no right of B has been invaded and no actual damage done. Then, upon what principle of law, as applicable to the doctrine of prescription, can it be said that A, after the lapse of twenty years, acquires a prescriptive right to have his lands supported by the lands of B. In a later case,⁴ POLLOCK, C. B., questions the soundness of any such doctrine in a very

¹ Brown v. Robbins, 4 H. & N. 186; Jeffries v. Williams, 5 Exch. 792; Roberts v. Haines, 6 E. & B. 648; 7 id. 625. Where the act is wrongful, the injury to the buildings may be recovered as consequential damages. Bonomi v. Backhouse, E. B. & E. 622; Hamer v. Knowles, 6 H. & N. 459; Stroyman v. Knowles, id. 454; Partridge v. Scott, 8 M. & W. 60; Humphries v. Brogden, 1 Eng. Law & Eq. 241; Wyatt v. Harrison, 8 B. & Ad. 871; Harris v. Ryding, 5 M. & W. 60.
² Stansell v. Jollard, 1 Selw. N. P. 444; Hide v. Thornborough, 2 Car. & K. 250; Dodd v. Holme, 1

Ad. & El. 498; Partridge v. Scott 8 M. & W. 220.

³ Palmer Fleshees, 1 Siderfin, 167; Hide v. Thornborough, 2 Car. & K. 250; Humphries v. Brogden, 1 Eng. Law & Eq. 241; Thurston v. Hancock, 12 Mass. 220; La Sala v. Holbrook, 4 Paige's Ch. (N. Y.) 169; Bonomi v. Backhouse, E. B. & E. 622; Brown v. Windsor, 1 C. & J. 27; Partridge v. Scott, 8 M. & W. 220; Eno v. Del Vecchio, 4 Duer, 53; McGuire v. Grant, 25 N. J. 356.

⁴ Solomon v. Vinters' Co., 4 H. & N. 597.

pertinent manner. He says: "It is difficult to see how the circumstance of the house having stood there twenty years makes any difference, or creates a right where houses are supposed to have been built by different adjoining owners, each with its own separate and independent walls, but upward of twenty years ago one of them got out of the perpendicular, and leaned upon and was then supported in part by the others, so that if the latter were removed the other would fall. It cannot be a right by prescription, which supposes a state of things existing before the time of legal memory. It seems to us that, in the absence of all evidence as to origin or grant, the only way in which a right can be supported is that suggested by LORD CAMPBELL;' namely, an absolute rule of law similiar to that which is stated to have existed in the civil law. But there is no authority for any such rule to be found, at least none was stated to us."

In this country, so far as the question has ever been decided, it has been held that no such right can be acquired by prescription, andt hat no user which is neither preventable by the owner of an adjoining estate, nor actionable, can found an easement. The doctrine as stated in the text as to the essential requisites of the user to gain a prescriptive right, is fully adopted in England;' but with a singular inconsistency, the courts of that country hold that this rule does not apply to a case of lateral support, because, in the latter case, the adjoining owner may, by building on his own land, physically prevent the acquisition of the right, although neither at law or in equity has he any redress against the acquisition of the

¹ *Humphries v. Brogden*, 1 Eng. Law. & Eq. 241.

² *Mitchell v. The Mayor of Rome*, 49 Ga. 19; *Napier v. Bulwinkle*, 5 Rich. (S. C.) §11. "When," says WARDLOW, J., in the last case, "the enjoyment was in its nature hidden, or, although it was apparent, there were no ready means for resisting it within the power of the servient owner, assent was not implied, and the influence of twenty years' time, therefore, not acknowledged." In the first case

cited, TRIPPE, J., very pertinently says: "Statutes of limitation apply to cases where one is in the *adverse possession* of property that may be claimed by another. *The use cannot be adverse unless exercised in denial of the title, and in derogation of the right of another.* It cannot be adverse to another, *unless he has a right of action on account of a wrong done him.*" See also, *Peterson v. McCullough*, 50 Ind. 35.

right. That is, A, by building upon the extremity of his boundaries, may compel B to erect a building adjoining, whether he desires to so use his premises or not, under the penalty, if he does not build, of having his premises burdened with an easement for the support of A's building.¹

¹ *Struges v. Bridgman*, Ct. of Appeals, July 1st, 1879, reported in Vol. 20, p. 889, of *The Albany Law Journal*.

² *Angus v. Dalton*, L. R. 4 Q. B. Div. 162.

CHAPTER XXVII]

EXCEPTIONS, RESERVATIONS AND CONDITIONS.

- SEC. 273. What are exceptions.
 SEC. 274. Distinction between and reservations.
 SEC. 275. Construction of exceptions and reservations.
 SEC. 276. Provisos and conditions.—Description and nature of.
 SEC. 277. Conditions precedent or subsequent.
 SEC. 278. Construction of conditions.
 SEC. 279. By what instrument they may be made.
 SEC. 280. By what words they may be created.
 SEC. 281. Between what parties binding.
 SEC. 282. Schedules, indorsements, &c.—Schedule of fixtures, furniture, &c.—When part of the lease.
 SEC. 283. Alterations indorsed before the lease is executed.

Sec. 273. What are exceptions.—An exception must be of a particular thing out of the thing demised, which is susceptible of severance from the general estate, as a certain field out of a farm, certain rooms in a house, and the like, and an exception of that which is expressly granted is inoperative and invalid.¹ Thus, a demise of a mill and the machinery, except the machinery, or a house and shops, excepting the shops,² or twenty acres of land, excepting ten acres thereof,³ is invalid, because in each case it is an exception of something granted, whereas it should be an exception *from* the grant, as “the mill, excepting the machinery therein,” or “the dwelling-house, No. 24 Forsythe St., except the third floor,” or “all my farm in, &c., except the Phelps lot, so called,” or “twenty acres of land, except the wood

¹ *Stukeley v. Butter*, Hob. 170; *Miller v. Pratt*, 8 Dy. 264 b; *Cudlip v. Rundle*, 4 Mod. 9.

b; *Anderson v. Benloe*, Benl. 181; *S. P. Kenson v. Reading*, Cro. Eliz. 244.

² *Horneby v. Clifton*, 8 Dy. 264

³ *Miller v. Pratt*, 8 Dyer, 264 b.

thereon," &c.¹ The exception must relate only to a *part* of the estate granted; if it embraces the whole it is repugnant and void. Thus, where a person demised all his lands in Landhurst, "except the manor of Hothby," and it turned out that he had no other lands in Landhurst except the manor, it was held that the manor passed to the lessee, as the exception was repugnant and void.² So if twenty acres of land is demised, "except one acre thereof," the exception is void, because it is of a moiety of the thing expressly granted; but if a particular lot or farm is granted, except one acre, or any other quantity less than the whole, it is good, because the lessee has a lot or farm left, notwithstanding the exception.³ So it must be of something connected with the estate to which the lessor has a right, otherwise it is void. Thus, if a lessee for years or for life makes an underlease, excepting the wood, timber, gravel or clay, or the benefit and profit of mines in the land, the exception is void, because, not being a lessee without impeachment of waste, he has no right to the things excepted.⁴ But the rule is otherwise where the lessor is tenant without impeachment for waste,⁵ or where the right to the things excepted is expressly conferred upon him.⁶ So if he grants a less estate than he has, so that a reversion remains in him, he being liable to his lessor for waste, may properly secure to himself a remedy against his sub-tenant therefor; and where a tenant for ten years sub-lets for five or any number of years less than his time, he may properly except the wood, timber, mines, &c., but not if he grants his whole estate.⁷

¹ *Miller v. Pratt*, 3 Dyer, 264 b, n, 40.

² *Dowell's Case*, Cro. Eliz. 6.

³ *Miller v. Pratt*, ante.

⁴ *Saunders's Case*, 5 Coke, 12 a, but so far as open mines are concerned it would seem that such an exception would be operative, because the tenant has a right to work those, but not those *not* open. *Stoughton v. Leigh*, 1 Taunt. 402; *Astrey v. Ballard*, 2 Lev. 185; *Whitfield v. Bennet*, 2 P. Wms. 242; *Darey v. Askwith*, Hob. 234. But new shafts or pits

may be opened for the purpose of working the old mines. *Clavering v. Clavering*, 2 P. Wms. 388. If land, "and all mines therein," is leased, the tenant may open new mines. *Saunders's Case*, ante.

⁵ *Sacheverel v. Dale*, Latch. 268; 1 Comyn's Digest, 607.

⁶ *Saunders's Case*, 5 Coke, 12 a.

⁷ *Bacon v. Gyrling*, Cro. Jac. 296. In *Percy's Case*, 13 Coke, 60, the court noted the distinction and the reason therefor as follows: "If a tenant for life leaseth for years, excepting the timber trees,

SEC. 274. *Distinction between an exception and a reservation.*—The distinction between an exception and a reservation is, an exception operates upon a thing *in esse*, which, unless restricted by the words of the lease, would pass to the lessee;¹ but a reservation is always of a thing not *in esse*, but newly created or reserved out of the land or tenement demised.² It is the legal effect of the words used rather than the words themselves that determines whether the lease is subject to an exception or a reservation merely, as, even though the lease contains a clause “reserving the north-east half of said lot,” if it would be valid as an exception it will be treated as such. So if premises are demised, “except a right of way,” this is a mere reservation, for such is the legal effect and evident intention of the parties.³ A reservation cannot be made in favor of a stranger.⁴ A component part of the thing demised can-

the same is lawfully and wisely done, for otherwise, if the lessee cutteth down the trees, the tenant for life should be punished for waste, and should not have any remedy for waste against the lessee for years.” (He may, however, have a remedy in case, in the nature of waste, *Green v. Cole*, 2 Saund. 252 n 7; and equity would restrain the waste at the suit of the landlord. *Abraham v. Budd*, 2 Freem. 55.) The court goes on to state that by excepting the trees, &c., the tenant secures himself a remedy against his sub-tenant. “And,” the court adds, “this is not like *Saunders’s Case*, ante, which was affirmed to be good law; for there, the lessee assigned over *his whole interest*, and therefore could not except the mines, &c., which he had not, but as things annexed to the land, and therefore he could not have them when he had parted with his whole interest, nor he could not take them either for reparations or otherwise; but when tenant for life leaseth for years, except the timber, trees, &c., *the same remaineth yet annexed to his freehold*, and he may command the lessee to take them for necessary reparations of the houses. And in the said case of *Saunders*, a judgment is cited between *Foster*

and *Bourd*, that where lessee for years assigns over his term, except the trees, &c., that waste in such case shall be brought against the assignee. But in this case, without question, waste lieth against the tenant for life, and so there is a difference.”

¹ Co. Litt. 47 a; *Shep. Touch.* 78; *Ives v. Van Auker*, 34 Barb. (N. Y.) 566, *Whittaker v. Brown*, 46 Penn. St. 197.

² Co. Litt. 47 a; *Bullen v. Denning*, 5 B. & C. 842; *Ives v. Van Auker*, ante; *State v. Wilson*, 42 Me. 9; *Marshall v. Trumbull*, 28 Conn. 188. As a right of way over the land granted or demised, *Bowen v. Conner*, 6 Cush. (Mass.) 182, or a right to enter to look for mines, or to open and work quarries, &c., *House v. Palmer*, 9 Ga. 497, or any privilege over or upon the land, as that of hunting, fishing, &c. *Jeffreys v. Evans*, 19 C. B. N. S. 246.

³ *Marshall v. Trumbull*, 28 Conn. 188. In *Sloan v. Lawrence Furnace Co.* 29 Ohio St. 468, land was granted “reserving all the minerals,” and it was held an exception, as such was the evident intent of the parties.

⁴ In *Hornback v. Westbrook*, 9 John. (N. Y.) 73, the grantor reserved certain rights to the inhabitants of R, and the court held

not be reserved.¹ A reservation of all mines, timber trees, minerals, &c., although the word "reserving" alone is used, is nevertheless an exception, because it relates to a component part of the thing demised.² So there may be both an exception and a reservation derived from the same word, the legal effect being deemed expressive of the intention of the parties. This was well illustrated by an early case.³ In that case the plaintiff demised a house "*excepting two rooms, and free passage, ingress, egress and regress to and from them.*" The passage having been shut up by the lessee's assignee, the plaintiff brought an action of covenant. The defendant contended that trespass was the proper remedy. But the court held that the plaintiff's remedy in covenant was proper, upon the distinction that if the disturbance had been in the *chamber*, a thing *excepted* and not reserved, the action of covenant could not have been maintained: but, that it was otherwise in this case where the lessee had agreed to let the lessor have a right of way, a thing newly created, as it were, by the grant of the lease.

It is proper to insert in all leases, where an exception is made, a provision that the lessor may enter or do any acts upon the land necessary to make the exception effectual, but, even though no such right is expressly reserved, yet *it is implied from the exception itself, that the lessor may enter upon the premises, or do any act thereon necessary to make the exception effectual.*⁴ If,

that it was void. See also 2 Preston's Conveyancing, 462. But *contra*, see statement of MANWOOD, J., in 8 Leon, 85, that "if a lease be made to A, except a certain close to B, a stranger, B shall have it;" but this is not regarded as good law by any of the text writers, nor are there any decisions to sustain it.

¹ *Fancy v. Scott*, 2 Man. & Ry. 385.

² *Cardigan v. Armitage*, 2 B. & C. 197; *Douglass v. Locke*, 2 Ad. & El. 705.

³ *Bush v. Coles*, 12 Mod. 24.

⁴ Anonymous, 2 Mod. 317. If imber and trees are reserved, there is an implied reservation of

a right to enter and cut and draw them away. If mines, minerals, quarries, &c., are reserved, there is an implied reservation of a right to enter to work and win them, &c., &c. In *Foster v. Spooner*, Cro. Eliz. 17, it was held by all the court, "that if a man maketh a lease reserving the wood, &c., he may justify the entry to cut and carry them away. *Liford's Case*, 11 Coke, 46 b. In *Rich v. Makepeace*, Noy. 29, it was held that even though the trees were excepted, the lessee had a right to take the loppings for firebote, but this is not the rule, and it seems well established that an exception of the trees carries with it

however, special rights are reserved, none others will pass. As, if a certain close is excepted, "with all ways to the same belonging or appertaining," no way will pass unless legally appurtenant to the close,¹ or unless it appears from the grant itself that the parties meant to use the words "belonging and appertaining" in a more extended sense. But under the words "with all ways to the demised premises belonging, or *with any part thereof used or enjoyed*," any way which, at the time the grant was made, is used with any part of the demised premises, will pass, whether specifically mentioned or not.² It has been held that a mere reservation of a right of way over the demised lands is neither an exception or a reservation, being neither parcel of the thing demised, nor issuing out of it, but is, strictly speaking, an easement, and pleadable as a grant.³ "A right of way *reserved*," says TINDAL, C. J., in the case last cited, "(using that word in a somewhat popular sense) to a lessor, as in the present case, is, in strictness of law, an easement newly created by way of grant from the grantee or lessee, in the same manner as a right of sporting or fishing, which has been lately much considered in 'several' cases."⁴ But where the lessee does not sign the lease, such a right cannot be said to be granted by him, and, unless sustainable as a reservation or exception, it would be void;⁵ and, whatever may be said to be the result of a strict construction, rights of way, &c., are treated as proper subjects of reservation, especially if they are incident to any other exception or reservation in or out of the demised premises.⁶

not only all the fruits, but all the boughs or loppings. *Goodright v. Vivian*, 8 East, 191; *Smith v. Bale*, Cro. Jac. 549; *Shep. Touch.* 100.

¹ *Barlow v. Rhodes*, 1 Cr. & M. 489.

² *Kooystra v. Lucas*, 5 B. & Ald. 880.

³ *Durham &c., R. Co. v. Walker*, 2 Q. B. 940.

⁴ *Douglass v. Lock*, 2 Ad. & El. 705; *Wickham v. Hawker*, 7 M. & W. 63.

⁵ *Durham &c., R. Co. v. Walker*, ante, p. 967.

⁶ *Fancy v. Scott*, 2 Man. & R.

235; *Mitcalfe v. Westaway*, 17 C. B. N. S. 958; *Proud v. Bates*, 11 Jur. N. S. 441. If a lessor intends to reserve a right of way over the demised premises *he must expressly reserve it*, *Good v. Hill*, 2 Esp. 690; *Brown v. Meady*, 10 Me. 891, unless it is implied as an incident to some other reservation or exception in the demise, as the effect of an exception is to except all things dependent upon or incident to it. *Foster v. Spooner*, Cro. Eliz. 17; *Liford's Case*, 11 Coke, 46 b; *Cardigan v. Armitage*, 2 B. & C. 207; *Sacheverel v. Day, Latch.*

If the exception or reservation confers an interest in the land, it is assignable. Thus where a railway company excepted and reserved out of a demise of land a patent slip therein, and the machinery connected therewith, with free access thereto "for themselves, their successors and assigns, officers, servants and workmen:" it was held that a licensee of the company might justify using the slip.¹ Where a person agreed to let a farm, *except thirty-seven acres* (not saying which), held, that he had the right to select which thirty-seven acres should not be included in the lease.² In all good exceptions these things must always concur: 1, the exception must be by apt words, as "saving and excepting," or the like;³ 2, it must be a part of the thing demised, and not of some other thing; 3, it must be part of the thing only, and not all; and not the greater part, or the substance of the thing granted; 4, it must be of such a thing as is severable from the premises demised, and not of an inseparable incident; 5, it must be of such a thing as the person in whose favor the exception is made may have, and which properly belongs to him; thus, it must be of a particular thing out of a general, and not of a particular thing out of a particular thing; 6, it must be certainly described and set down; therefore, if one demises a farm excepting one acre, without setting forth which or what acre it shall be, the exception is void.⁴

If a man possessed of a new and an old one makes a lease with an exception of the new house for his use when he pleases to reside there, and at other times for the use of the lessee, the exception is good as to the new house, and is not avoided by the words "at all times to

168; *Bacon v. Gryling*, Cro. Jac. 286; *Percy's Case*, 18 Coke, 60; 1 Comyn's Dig. 607.

¹ *Mitcalfe v. Westaway*, 17 C. B. N. S. 658. A third person may justify under a grant or license from the grantor or lessor, but not under a general reservation, or a special one to him. See also *Moulton v. Faught*, 47 Me. 595.

² *Jenkins v. Green*, 27 Beav. 487; *Thurston v. Masterson*, 9 Dana (Ky.), 228. But see *Dorrell v.*

Collins, Cro. Eliz. 6. Also *Mooney v. Cooledge*, 80 Ark. 640, where it was held that the same certainly is required in an exception and reservation as in the grant itself, and that where land is conveyed, "except one acre thereof," without designating *which* acre, the exception is void.

³ Co. Lit. 47 a.

⁴ *Dorrell v. Collins*, Cro. Eliz. 6. But see *Jenkins v. Green*, *supra*.

be used by the lessee, when the lessor doth not dwell there;" for that sentence does not enure as an exception out of an exception (which sets the matter at large), but only as a declaration of the lessor's intention in making the exception;—the latter words, however, make the lessee tenant at will. So if a man leases his houses, excepting his new house, *during the term*, this exception is good: but if he excepts it *during life*, it is void; for the words "during life" qualify the exception, and show his intent that the house shall not be excepted during the whole term, and for that reason is void.¹

SEC. 275. **Construction of exceptions and reservations.**—A clause in a lease purporting to reserve underwoods and underground produce does not enure as a reservation, but as an exception.² Thus, a lease of all lands excepted all timber, timber trees and other trees, &c., bushes and thorns, other than such bushes and thorns should be necessary for the repairs of the fences; the lessee covenanted to keep fences in repair, and the lessor covenanted to find and provide, if growing on the premises, rough timber, stakes and bushes; it was held that the provision as to bushes and thorns necessary for repairs was not an exception out of an exception, but that all trees, bushes and thorns were excepted out of the demise, whether part of a fence or not, or whether necessary for repairs or not.³ An exception of "all the wood" will be an exception of the soil whereon the wood grows.⁴ In like manner, if all the underwood and copse wood is excepted, the land will also be excepted, unless it clearly appears that it was merely the intention of the parties to except only the wood itself.⁵ And so of

¹ Cudlip v. Randall, 3 Salk. 156.

² Douglas v. Locke, 2 Ad. & El. 705.

³ Jenney v. Brook, 6 Q. B. 323.

⁴ Ive v. Sams, Cro. Eliz. 521; Whistler v. Paslow, Cro. Jac. 489.

⁵ Whistler v. Paslow, *supra*; Pincomb v. Thomas Cro. Jac. 524. In this case a tenement was let and a close connected with a wood

lot, and the lessor excepted all saleable woods then growing, or which should thereafter grow thereon, *with free entry, &c., for felling and carrying the same away*, and the court held that the soil was not excepted, but passed to the lessee. The reason for this decision is not given, but, unquestionably, it was predicated upon

an exception of fruit trees.' But where timber trees are excepted, the soil in which they grow will not be covered by the exception.' Under an exception of "all wood and underwood," trees, great and small, are generally excepted; but not fruit trees.' A parol demise of land, reserving to the landlord "all the hedges, trees, thorn bushes, fences, with lop and top," operates as a license to enter the land for the purpose of cutting and carrying away the trees.' Where a lessee for life made a lease for years, excepting the wood, underwood and trees growing upon the land, it was held a good exception, although he had no interest in them but as lessee; because he remained always tenant, and was chargeable in waste—wherefore to prevent it he might make the exception: but if a lessee for years assign over his term with such an exception, it is a void exception.' An exception of "all trees, woods, coppice-wood grounds, of what kind or growth soever," does not extend to apple-trees; an exception of "all timber-trees and other trees, but not the annual fruit thereof," does not include apple-trees.' By a lease of a tenement described as containing

the fact that a right of entry was reserved, which show that the parties did not understand that the soil was reserved, as in that case a reservation of the right of entry would have been unnecessary.

¹ Smith v. Bole, Cro. Jac. 458.

² Whistler v. Paslow, Cro. Jac. 487. Except so much as is necessary for the vegetation of the trees excepted. Liford's Case, 11 Coke. 46 b; Whistler v. Paslow, Cro. Jac. 487. The lessee, where only trees are excepted, is entitled to the underwood and herbage where the trees grow. Dyer, 79 a, pl. 78. If the trees are excepted the lessor holds them as an inheritance, and not as a chattel. They are annexed to, and will pass with, the reversion. Stamp v. Clinton, 1 Roll. 95. (See Liford's Case, cited ante, which is the same as the one last cited, under a different name.) When trees are not excepted, although the property therein remains in him, he cannot enter to cut them, nor can he sell them so as to defeat any of the tenant's

rights therein, or authorize a person to enter and take them. But, while there are several cases in which it is said generally that the lessor cannot sell the trees during the lease, Waller v. Petty, Cro. Car. 274; Berry v. Heard, Palm. 328; Liford's Case, 11 Coke, 46 b, yet it is evident that while the lessor cannot sell the trees during the lease, so as to entitle the purchaser to enter and take them, or so as to defeat any of the tenant's rights therein, yet, a sale of them would be operative as an estoppel, after the lease had expired.

³ London v. Southwell, Hob. 304, and where all the large trees are excepted, trees that become large are included. Garnock v. Cliff, 1 Leon, 61.

⁴ Hewitt v. Isham, 7 Exch. 77; Liford's Case, 11 Co. R. 51 b.

⁵ Bacon v. Gyrling, Cro. Jac. 296.

⁶ London v. Southwell, Hob. 304; Wyndham v. Way, 4 Taunt. 316.

⁷ Bullen v. Denning, 5 B. & C. 842.

nineteen acres, "except all timber-trees, wood, under-wood, &c.," six acres of the soil, which were then covered with growing wood, are not excepted.' A parol demise of land, reserving to the landlord, "all the hedges, trees, thorn-bushes, fences, with lop and top:" held, that such reservation operated as a licence to enter the land for the purpose of cutting and carrying away the trees.' A clause purporting to reserve and except to the lessor the power of hunting, &c., over the demised premises, enures as a grant from the lessee to the lessor of a right or privilege, and not as a reservation or exception.' Any one may lease or convey his land, and reserve to himself the right of entering for any purpose, without being subject to be sued as a trespasser; but, in this, as well as in all other exceptions, the intent of the parties controls, and in ascertaining such intention, the circumstances surrounding the parties and the property is to be considered. Thus, an exception in a deed, made in 1653, of the free liberty of hunting and hawking, was held not to extend to shooting feathered game *with a gun, because guns, not being in common use*, could not be in the contemplation of the parties.' A demise of lands, excepting

¹ Leigh v. Heald, 1 B. & Adol. 622.

² Hewitt v. Isham, 7 Exch. 77.

³ Doe d. Douglas v. Lock, 2 Ad. & El. 705, 748; Wickham v. Hawker, 7 M. & W. 103; Ewart v. Graham, 7 H. L. Cas. 838.

⁴ Moore v. Earl of Plymouth, 7 Taunt. 614; Shep. Touch. 80. All the facts must be taken together, Lewis v. Baird, 8 McLean (U. S.), 56, and the circumstances under which the instrument was executed, and all extraneous facts are to be looked at. Stanley v. Green, 12 Cal. 148; French v. Carhart, 1 N. Y. 96; Mulford v. Le France, 26 Cal. 88; Dunn v. English, 23 N. J. L. 126; Salisbury v. Andrews, 19 Pick. (Mass.) 250; Bradford v. Cressy, 45 Me. 9; Winnipiseogee Co. v. Mathieson, 46 N. H. 83; Hadden v. Shouty, 15 Ill. 581; Adams v. Frothingham, 8 Mass. 352. But, where the terms of the deed are clear and explicit, or the instrument can operate, neither

the acts of the parties nor any other extraneous circumstances are admissible, but the deed itself must control. Hutchings v. Dixon, 11 Md. 29; Dunn v. Bank of Mobile, 2 Ala. 152; Means v. Church, 8 W. & S. (Penn.) 808. Where the instrument is clear in its terms, the intent of the parties as gathered from the language used is to control. Chouteau v. Snyder, 21 N. Y. 179; Payton v. Ayres, 1 Md. Ch. 64; Mills v. Cotton, 22 Vt. 98; Dames v. Prentice, 16 Pick. (Mass.) 435; Furbush v. Goodwin, 25 N. H. 428; Benedict v. Gaylord, 11 Conn. 332; Pike v. Monroe, 36 Me. 309. The grammatical sense is not adhered to, where a contrary intent is apparent. Hancock v. Watson 18 Cal. 187; Jackson v. Tapping, 1 Wend. (N. Y.) 388. And in the absence of any other mode of ascertaining the intention of the parties, it will be taken most strongly against the lessor. Bees- san v. Patterson, 36 Penn. St. 24.

and reserving all *royalties*, with a clause for the lessor to be allowed to prosecute actions against persons trespassing for the purpose of hunting, &c., does not amount to a grant by the lessee of a liberty for the lessor to enter for the purpose of pursuing, killing and taking birds of warren.¹ A demise was made of a mansion-house and land, with the sole license of sporting over all other lands of the lessor's, subject to the liberty for each tenant on his *farm* to kill rabbits thereon; this exception extends not only to farms existing at the time of the demise, but also to other lands, as plantations, subsequently let as farms.² Where a lease was made subject to a right of way on foot for horses, oxen, cattle and sheep, no right of way to draw manure is reserved.³ Notwithstanding an exception in a lease of certain closes or rooms, which the lessee is not to use, he may pass and repass through them if they are so situated that he cannot otherwise have the complete enjoyment of the lands or premises demised to him.⁴ Where there was a lease of certain lands, together with all houses, watercourses, &c., excepting "a watercourse flowing or descending from" a certain spot, through a meadow, it was held in the particular case to be an exception of the water itself, not of the channel through which it flowed.⁵ Where there was a demise of a mill and a stream of water, except so much water as should be sufficient for the supply of persons already contracted with whom the lessor had or thereafter should contract to supply, provided that such a quantity should be left as should be sufficient to supply the mill for twelve hours a day; it was held, that this was not an absolute undertaking to supply water to work the mill twelve hours a day, but that it was a demise of the mill as the water was flowing at the time of the demise.⁶

SEC. 276. *Provisos and condition.* — Description and nature of.—The terms "proviso" and "condition" are

¹ Pannell v. Mill, 8 C. B. 625.

² Newton v. Wilmot, 8 M. & W. 711.

³ Brunton v. Hall, 1 Q. B. 792.

⁴ 11 Co. R. 53 a.

⁵ Doe d. Earl of Egremont v. Williams, 11 Q. B. 688.

⁶ Blatchford v. Mayor, &c., of Plymouth, 8 Bing. N. C. 691.

synonymous, and signify some quality annexed to real estate, by virtue of which it may be defeated, enlarged or created upon an uncertain event. Such qualities annexed to personal contracts and agreements are generally called conditions.¹ A proviso or condition of re-entry may be inserted in a new agreement for a lease not under seal.² It will even form part of a new implied tenancy from year to year upon the terms of a previous lease or agreement.³ A condition may be annexed to an estate of inheritance, of freehold, or for years.⁴ A proviso or condition differs from a covenant in this, that the former is in the words of and binding upon both parties, whereas the latter is in the words of the covenantor only. *It is a rule in reference to provisos, that where a proviso is, that the lessee shall perform or not perform a thing, and no penalty is annexed to it, that it is a condition, otherwise it would be void; but if a penalty is annexed, it is a covenant.*⁵ The word "provided," of itself imports a condition, unless the language is such as to strip it of that effect; as, if a lease contains a clause as follows: "Provided, however the said John Doe shall at all times keep the buildings and premises in good repair," the keeping of

¹ Bac. Abr. Tit. Condition. A condition may be said to be a qualification annexed to an estate by the lessor, by which the estate may be defeated, enlarged, or created, upon an uncertain event, and upon which the vesting or continuance of the estate depends. Strictly speaking, its object is to defeat the estate in a certain contingency, but, if an estate is to be enlarged or created, its office is to mark the event or period of its commencement and its extent or duration. Co. Litt. 214 b; Mary Portington's Case, 10 Coke, 41. In order to create an effectual condition, the vesting or ending of the estate must depend upon an uncertain contingency. It may be introduced into a lease by parol, where the lease is by parol, and a parol is valid, Henniker v. Watts, 8 B. & C. 808, or may be contained in the body of the lease, or endorsed there-

on, provided that, in the latter instance, the endorsement must precede the execution of the lease, as in such a case the endorsement is treated as a part of the lease. Griffin v. Stanhope, Cro. Jac. 456. But if endorsed *after* the lease is executed, unless it is under seal and executed with all the formalities required by law for the execution of the lease itself, it reduces the whole contract to a simple contract, and defeats the remedies peculiar to specialties. Hydeville Slate Co. v. Eagle R. R. Slate Co., 40 Vt. 384.

² Hayne v. Cummings, 16 C. B. N. S. 421.

³ Thomas v. Packer, 1 H. & N. 669.

⁴ Com. Dig. Tit. Condition (A), 7.

⁵ Simpson v. Titterell, Cro. Eliz. 242. Gray v. Blanchard, 8 Pick. (Mass.) 284; Jackson v. Allen, 8 Cow. (N. Y.) 221.

the buildings and premises in good repair is a condition to the tenant's right to retain possession during the term fixed in the lease, and upon his failure to do so the landlord may bring ejectment; but, if after the word repair there is added, "or shall pay the sum of five dollars for each month that he shall neglect to do so," in the latter case there is no condition, because the right of re-entry is not reserved, but a penalty is provided for the breach.¹ A condition that affects the estate runs with the land. Thus, a condition in a lease, that if the rent shall be in arrear, or if the lessee shall neglect or fail to perform and observe any or either of his covenants therein, the lessor may, at any time, while such neglect or default continues, enter upon the premises and repossess the same as of his former estate, is applicable to covenant that the lessee shall not occupy the buildings, or in any manner suffer them to be occupied, for dwellings, or for any unlawful purpose. Such covenant runs with the land, and is binding upon the estate in the hands of the sub-tenants of the lessee, whose use of the same for unlawful purpose will be a breach of the covenant, and work a forfeiture.² Insensible words will not be construed as constituting a condition; as, if a lease is made to a woman for a certain number of years, "provided she lives so long and keeps herself such," because there is nothing from which the court can ascertain how she was to keep herself. But if the words "unmarried," or "widow," had been used in place of the word "such," a condition would have been created; nor will a mere covenant be construed as having the effect of a condition, unless a clause of re-entry for its

¹ Gray v. Blanchard, 8 Pick. (Mass.) 284. In Jackson v. Allen, 8 Cow. (N. Y.) 221, the words "and these presents are upon this condition, viz., that the lessee shall suffer the lessor to enjoy a right of way through the demised premises without obstruction," make the estate upon condition, on breach of which the lessor has a right to re-enter, or bring ejectment. While a lessor may re-en-

ter for the breach of a condition yet the lease is not by such breach rendered absolutely void, but is voidable at the election of the lessor. Western Bank v. Kyle, 6 Gill. (Md.) 843; Clark v. Jones, 1 Den. (N. Y.) 516.

² Wheeler v. Earle, 5 Cush. (Mass.) 31.

³ Comyn's Digest, Condition (A), 6; Hardy v. Sayer, Cro. El. 414.

breach is inserted in the lease. Thus, a clause in the lease, "provided, however, the said John Doe covenants and agrees, upon six months' notice, and payment to him, &c., to surrender the premises" to the landlord, is a mere covenant, and not a condition;¹ nor do mere words of limitation or restraint create a condition; as, where the lease authorizes the tenant to cut firewood or timber for the use of the premises, *provided* he does not take the great trees. In this case, if the tenant cuts trees or timber that ought not to be cut, it might amount to waste, but a right of re-entry does not exist unless he cuts the "great trees."² Where an active condition is annexed to an estate, the lessee forfeits his estate unless he performs it within the time limited; or, if no time is specified, within a reasonable time,³ in view of the nature of the estate created, the importance of performance, and the evident intention of the parties.⁴ If there are acts to be done by the lessor that precede performance of the condition, performance cannot be required, nor a breach set up, until such precedent act is performed.⁵ Where a condition is to the alternative, giving the lessee his election to do either of two things, as "to build a new barn or repair the one now upon the premises," if the lessor pulls down the old barn, rendering it impossible for the lessee to exercise his election, he is discharged from the condition, under the rule that, "when a condition becomes impossible of performance by the default of one party, the other is excused from performing at all;"⁶ and the same rule prevails as to conditions subsequent when performance is illegal, or becomes impossible, either by the act of God or operation of law, or is repugnant to the estate granted, and the estate vests as though the lease contained no condition.⁷ Where,

¹ Tallman v. Coffin, 4 N. Y. 184.

² Comyn's Digest, Condition (A.)

6. See also, Jackson v. Harrison, 17 John. (N. Y.) 66; Hardy v. Seyer, Cro. Eliz. 414; Jackson v. McClallan, 8 Cow. (N. Y.) 265.

³ Hamilton v. Elliott, 5 S. & R. (Penn.) 384.

⁴ Finlay v. King, 8 Pet. (U. S.) 376.

⁵ Merritt v. Emery, 10 Pick.

(Mass.) 507; People v. Manning, 8 Cow. (N. Y.) 297; Scovell v. Cabell, Cro. El. 107; McLachlan v. McLachlan, 9 Paige Ch. (N. Y.) 584; Holland v. Bouldin 4 T. B. Mon. (Ky.) 147.

⁶ Moore v. Sael, 2 Leon 182; Comyn's Digest, Condition (K) 2.

⁷ Scovell v. Cabell, Cro. El. 107; Peope v. Manning, ante; De Pey

however, the condition is in the alternative, and performance of one alternative was impossible *when the lease was made*, the lessee is still bound to perform the other.¹ As to conditions precedent, strict performance is required, and if it becomes impossible *from any cause*, the estate cannot vest; and this is the rule whether the lessee is an infant or *feme covert*, or a person laboring under any legal disability.² Where the condition is, that a certain thing shall not be done without the lessor's consent, consent once given dispenses with the condition, if the license is given in the manner provided in the lease.³

SEC. 277. Conditions precedent or subsequent.—Conditions are either precedent or subsequent. *Where a condition must be performed before the estate can commence, it is called "a condition precedent;" but where the effect of the condition is either to enlarge or defeat an estate already created, it is then called "a condition subsequent."*⁴ As to whether a condition is to be regarded as precedent or

ster v. Michael, 6 N. Y. 467; Mitchell v. Reynolds, 1 P. Wms. 189.

¹ Comyn's Digest, Condition (Ky.) 2.

² Williams v. Fry, 2 Lev. 21.

³ Dumpor's Case, 4 Coke, 119 b; Dakin v. Williams, 17 Wend. (N. Y.) 447; Bleeckner v. Smith, 18 id. 530; Chipman v. Emeric, 5 Cal. 49; Lynde v. Hough, 27 Barb. N. Y.) 415; Pennock v. Lyons, 118 Mass. 92; McKildoe v. Darracott, 12 Gratt. (Va.) 278; Dougherty v. Matthews, 55 Mo. 520; Gannett v. Albree, 103 Mass. 272. In England, however the rule has been changed by statute 23 Vict., chap. 28, so that a license will only discharge a condition by express words to that effect; but in this country the rule in Dumpor's Case is followed, and a license for one breach discharges the condition, whether the condition relates to a single or continuous duty.

⁴ Cruise's Dig. XII. Tit. 1, s. 6; 1 Inst. 16 a, 237 a, n, 1. Conditions subsequent are not favored in law, and can be raised only by apt words, and they must them-

selves import a condition and be so connected with the grant as to qualify or restrain it, Southard v. Central R. R. Co., 26 N. J. L. 13; Larabee v. Castleton, 58. Me. 211; Emerson v. Simpson, 43 N. H. 475; Ludlow v. N. Y., &c., R. R. Co., 12 Barb. (N. Y.) 440, and equity will often relieve against them, but will never, except in extreme cases, aid to divest an estate because of a breach thereof. They are never to be presumed, nor can they be established by proof *aliunde*, except to convert a deed absolute upon its face into a mortgage. Thompson v. Thompson, 9 Ind. 323 Rogers v. Sebastian, 21; Ark. 440. If a conveyance is made upon a condition subsequent and performance becomes impossible, the estate will vest without performance, Jones v. Doe, 2 Ill. 276; Hughes v. Edwards, 9 Wheat. (U. S.) 439, whether performance was rendered impossible by the act of the grantor, Whitney v. Spencer, 4 Cow. (N. Y.) 39, or the act of God. Merritt v. Emery, 10 Pick. (Mass.) 507.

subsequent does not depend upon the order in which it appears in the lease, *but upon the time of its performance*, and in determining the question, regard will be had to the circumstances of the transaction, and the evident intention of the parties. Thus, if there is a provision in the lease that "at the end of the term *all rents and covenants being complied with*" on the part of the lessee, he shall have the right to remove all buildings, &c., by him erected on the land during the term, performance by the lessee is a condition precedent to the removal of the buildings, and in the case cited below it was held that a tender of performance of the condition, upon condition that the lessor would permit the removal, was not good.¹ So, where the lease provides that the tenant may put an end to the term by giving notice of a certain duration, as one, two or six months, and paying all rents and performing all the covenants, the payment of rent and performance of all the covenants is a condition precedent to his right to determine the estate.² So, where the lease provides that upon the tenant's performance of all the covenants of the lease, the landlord shall, upon the termination of the term, pay to him the appraised value of all buildings erected, or improvements made upon the premises, and the lease among other things provides that the tenant shall pay all taxes, the payment of the taxes is a condition precedent to his right to recover such appraised value,³ and generally it may be said that where it appears by the terms of the lease that the performance of some act by the lessee forms the groundwork or consideration for the exercise of some right by, or of some obligation in his favor against the lessor, performance of such act is a condition precedent to the exercise of such right or the enforcement of such obligation,⁴ and the same rule applies

¹ *Clemens v. Murphy*, 40 Mo. 121; *Friar v. Gray*, 5 Exchq. 584; *aff'd* 4 H. L. Cas. 565.

² *Hotham v. East India Co.*, 1 T. B. 645; *Parmalee v. Oswego R. R. Co.*, 6 N. Y. 74; *Powers v. Ware*, 2 Pick. (Mass.) 451; *Gardner v. Corson*, 15 Mass. 500; *Hopkins v. Young*, 11 id. 802; *Nicoll v. N. Y. & Erie R. R. Co.*, 12 N. Y. 121.

³ *People's Bank v. Mitchell*, 6 N. Y. Weekly Reporter, 476.

⁴ *Friar v. Gray*, *ante*. Where one act is to be done by one party before another act, which is the consideration of it, is to be done by the other, performance by such party is a condition precedent to performance by the other. *Tilston v. Newell*, 18 Mass. 410;

where the landlord covenants to do some act which is apparently intended as an act precedent to the performance of a certain act by the tenant. As, if he covenants to fit up a building for a certain purpose before a certain day, *before* the term commences, if he fails to perform by the time, the tenant is absolved from the lease, or if he covenants to do such acts within a certain time *after* the term commences, the tenant may, upon his failure to perform, give up possession within a reasonable time thereafter, and is not liable for rent for the time he occupied. Thus, where a landlord agreed to let a house completely furnished, *and to send in sufficient furniture*, and the tenant agreed to take the house on those terms, and pay a certain rent therefor, and the landlord put the tenant in possession, but neglected to send in the furniture, it was held that the contract to furnish and to pay rent could not be separated, and that the landlord could not distrain for the rent.' It is only, however, when covenants go to the *whole* consideration that they can be said to be conditions precedent, or, in other words, when they are entire and indivisible, and it appears to have been the intention of the parties that the *whole* of what one had undertaken to perform should be done before any liability should attach to the other, although the one had partly performed, and the other had derived

Mullins v. Cabiness, Minor, (Ala.) 21; Couch v. Ingersoll, 2 Pick. (Mass.) 800; Craddock v. Aldridge, 2 Bibb (Ky.) 15; Goodwin v. Holbrook, 4 Wend. (N. Y.) 877; Cunningham v. Morrell, 10 John. (N. Y.) 208; Mecum v. Peoria, &c., R. R. Co., 21 Ill. 538; Thompson v. Gray, 2 S. & P. (Ala.) 60. But covenants may be both dependent and independent. Thus, if it is covenanted that the lessee or lessor shall do a certain act *before* the lease is made, and a certain other act upon the day when it is to be made, and a certain other act upon a day subsequent, the covenant to do the first act is independent, while the covenant as to the other two acts is dependant. Bean v. Atwater, 1 Conn. 8; Leonard v. Bates, 1 Blackf. (Ind.) 175; Kane

v. Hood, 13 Pick. (Mass.) 231; Robb v. Montgomery, 20 John. (N. Y.) 15; Gardner v. Corson, 15 Mass. 500. And where covenants are simultaneous, and each forms the consideration for the other, they are dependent, and *both* must perform, or neither is required to do so. Dorkin v. Williams, 11 Wend. (N. Y.) 67; Hounsford v. Fisher, Wright (Ohio.) 150; Parker v. Parmalee, 20 John. (N. Y.) 130. But where each covenants to do concurrent acts, and the covenant of one party rests upon a consideration independent of the covenant of the other, the covenants are independent. Day v. Essex Bank, Vt. 97.

¹ Mechelen v. Wallace, 7 Ad. & El. 54 n.

some benefit or advantage therefrom ;¹ and where one party covenants to do merely one thing, and the other covenants to do another, they are mutual covenants and not conditions precedent.² Indeed, covenants will be construed as dependent or independent according to the evident intent of the parties and the good sense of the case, and technical words will not be permitted to stand in the way of giving effect to such intention.³

In all cases where the obligation of one party precedes performance by the other, or in other words, from the language used, it is evident that one act is to be done as a consideration for the doing of some other act by the other party, such act is a condition precedent to performance by the other. As if a lessor covenants to repair the premises in the first instance, and the tenant covenants thereafter to keep them in repair, the tenant's obligation does not attach until after the landlord has repaired ;⁴ or where the tenant accepts a lease, provided the lessor puts the premises in repair, or fits them up for a certain business, liability for refusing to take possession under the lease, or for the rent thereof, he not having occupied the premises in such a manner as to waive performance by the lessor, does not attach unless the landlord performs.⁵ But, as previously stated, where the obligations are concurrent, even though one act is *partly* to precede another, it does not amount to a condition.⁶ Thus, where there was a stipulation in a lease for five years that it should be renewed for five years more if the

¹ *Mechelen v. Wallace*, ante; *Tillotson v. Newell*, 18 Mass. 306; *Grant v. Johnson*, 5 N. Y. 247; *Carpenter v. Creswell*, 3 Bing. 409; *Bennett v. Pixley*, 7 John. (N. Y.) 249; *Poppin v. Haight*, 20 Barb. (N. Y.) 429.

² *Palethorp v. Bergner*, 52 Penn. St. 149; *Carpenter v. Creswell*, ante; *Boone v. Eyre*, 2 W. Bl. 1812.

³ *McCrelish v. Churchman*, 4 Rawle (Penn.) 21; *Todd v. Summers*, 2 Gratt. (Va.) 167; *Barruso v. Maddan*, 2 John. (N. Y.) 145; *Howland v. Leach*, 11 Pick. (Mass.) 154; *Dwiggins v. Shaw*, 4 Ired. (N. C.) L. 46.

⁴ *Neale v. Ratcliffe*, 15 Q. B. 916; *Hutchinson v. Read*, 4 Exchq. 761; *Hunt v. Bishop*, 8 id. 675.

⁵ *Hickman v. Royl*, 55 Ind. 551; *Wright v. Lattin*, 38 Ill. 293; *Tidey v. Mallet*, 16 C. B. N. S. 268; *Coward v. Gregory*, L. R., 2 C. P. 153.

⁶ *Northrup v. Northrup*, 6 Cow. (N. Y.) 296; *Cannock v. Jones*, 8 Exchq. 233; *Lewis v. Welden*, 3 Rand. (Va.) 71; *Alexander v. Mann*, 6 T. B. Mon. (Ky.) 300; *Gazely v. Price*, 16 John. (N. Y.) 267; *Hopkins v. Young*, 11 Mass. 302; *Dean of Bristol v. Jones*, 1 E. & E. 484.

tenant desired to have it, *provided* all improvements were done by him, it was held, that the doing of such improvements during the first five years was not a condition precedent to his right to a renewal, but that such improvements might be done during the last five years.¹ So, where the lease provides that the tenant shall surrender, and that the lessor may take possession upon giving notice of a certain duration, and paying the tenant the damages he sustains by being prevented from occupying for the full term, the payment of compensation is not a condition precedent to the landlord's right to re-enter.² But where a lease contains a proviso that the tenant may put an end to the term by giving a certain notice *and performing all his covenants*, performance of *all* his covenants is a condition precedent to his right to give up possession.³

SEC. 278. *Construction of conditions.*—Condition as well as covenants are to be construed according to the real intentions of the parties ;⁴ but a condition will not be construed to extend to things of common right ; as if the condition is, that one shall enjoy such land immediately upon the grantor's death—here, if the executor takes the emblements, the condition does not extend to them.⁵ The court will not decide as to the meaning of an insensible condition or proviso for re-entry.⁶ Whether particular words in a lease amount to a condition or a covenant is a matter of construction and enures may be considered in determining the intention.⁷

SEC. 279. *By what instrument they may be made.*—A condition may be contained in the same deed, or indorsed upon the deed ; or may be contained in another deed executed the same day ;⁸ thus, a condition indorsed upon

¹ Palethorpe v. Bergner, 52 Pen n St. 149.

² Parsons v. Miller, 15 Wend. (N. Y.) 561 ; Bartlett v. Greenleaf, 11 Gray (Mass.) 98.

³ Hotham v. E. India Co., 1 T. R. 645 ; Gardner v. Corson, 15 Mass. 500 ; Powers v. Ware, 2 Pick. (Mass.) 451 ; People's Bank

v. Mitchell, 6 N. Y. Weekly Reporter, 476.

⁴ Cole Ejec. 407 ; Shinn v. Roberts, 50 N. J. L. 435.

⁵ Com. Dig. Tit. Condition (E).

⁶ Wynham v. Carew, 2 Q. B. 817 ;

⁷ Langley v. Ross, 56 Mich. 163.

Darke v. Bowditch, 82 B. 973.

⁸ Com. Dig. Tit. Condition (A) 9.

the back of a lease before the sealing and delivery was held of equal force with a condition within the deed ;¹ but where a lease for years was made, rendering rent, and the lessee covenanted to repair, &c., and afterwards the lessor devised to the lessee for more years, yielding the same rent, and under such covenants as were in the first lease, it was considered not to be a condition ; for although after the first lease was ended, the lessee would not be bound by the covenants, yet the will expressing that the lessee should have the lands, observing the first covenants, it could not be taken to be a condition by any intent to be collected out of the will.² If it is doubtful whether a clause is a covenant or a condition, the benefit of the doubt will be given to the tenant, and it will be construed as a covenant, because such a construction is most favorable to the lessee. But if the clause is susceptible of performing the office of a covenant *and* a condition, and such was the obvious intent of the parties, it will be given that effect, as if a lease is made for a term of years, provided that the tenant shall annually pay a certain rent, it is a covenant for the payment of rent, and a condition upon the non-performance of which the estate may be defeated.³ Conditions precedent will be liberally construed, and the intent of the parties will be given effect so far as can be done consistently with the language used ;⁴ and if it has been performed as nearly in accordance with the intent of the parties as possible, it will be treated as sufficient, although the performance does not accord with a strict construction of the condition ; but conditions that defeat the estate will be construed strictly, as forfeitures are not favored in law.⁵

SEC. 280. By what words they may be created.—Conditions are most properly created by using the word “condition,” or the words “on condition;” but the word

¹ Griffin v. Stanhope, Cro. Jac. 456 ; Goodright d. Nicholls v. Mark, 4 M. & S. 80.

² Bac. Abr. Tit. Condition (G.).

³ Livingston v. Stickles, 8 Paige (N. Y.) 398.

⁴ Co. Litt. 220 a.

⁵ Wadham v. Post Master Genl., L. R., 6 Q. B. 644 ; Crawley v. Rice, L. R., 10 Q. B. 302.

commonly and as effectually made use of, is, that of "provided."¹ The words "covenant" and "condition," when used in an agreement, do not necessarily mean a covenant under seal, or a condition in the strict legal sense of the word, but may, in order to effectuate the intention of the parties, be construed to mean "contract or stipulation."² The following words, in an agreement for letting, do not create a condition;—"The tenant hereby agrees that he will not underlet the premises without the consent in writing of the landlord."³ A covenant by the lessor for quiet enjoyment by the lessee, his executors, administrators and assigns, during the term, he or they paying the rent thereby reserved and performing the covenants on his and their part contained, is not a covenant subject to a condition precedent.⁴ If a proviso or condition has dependence upon another clause of the deed, or if the words of the lessee be to compel the lessor to do something, then it is not a *condition*, but a covenant only; as if there be in the deed a covenant that the lessee should scour the ditches and then these words follow, "provided that the lessor should carry away the earth." If the words run thus: "provided always, and the lessee, &c., doth covenant, &c., that neither he nor his heirs shall do such an act;" this is both a condition and a covenant:⁵ so if the words are "provided always, and it is covenanted and agreed between the parties, that the lessee shall not alien," this is both a condition and a covenant; for it is a condition by force of the proviso, and a covenant by force of the other words.⁶ Where in an agreement to demise land for a term of years at a certain annual rent, in which there was no clause of re-entry, there was a stipulation "that in case the said lessor should want any part of the said land to build or otherwise, or cause to be built, then

¹ Shep. Touch. 122; Co. Litt. 146; Crawley v. Mullin, 48 Mo. 517.

² Hayne v. Cummings, 16 C. B. N. S. 421.

³ Shaw v. Coffin, 14 C. B. N. S. 872.

⁴ Dawson v. Dyer, 5 B. & Ad. 584; and see Locke v. Furze, 19 C. B. N. S. 96.

⁵ Shep. Touch. 122; Co. Litt. 146.

⁶ Co. Litt. 108 b.

the lessee shall give up that part of the said land as should be requested by the lessor, by his making an abatement in proportion to the rent charged ; and also to pay for so much of the fence at a fair valuation, as he should have occasion from time to time to take away, by his giving or leaving six months' notice of what he intended to do :” it was held that this was merely a covenant, and not a condition.¹ But where a proviso in a lease was that in case the lessor at any time shall be desirous of having any part of the land delivered up to him and shall sign three months' notice, the lessee covenants to give it up, and that the lessor shall and may take peaceable and quiet possession, paying a fair compensation, and the rent being reduced at a certain rate per acre, it was held not to be a covenant merely.² By an agreement, in consideration of the rent and conditions thereafter mentioned, A was to have, hold and occupy, as on lease, certain premises therein specified, at a certain rent per acre ; and it was *stipulated* that no buildings should be included or leased by virtue of the agreement ; and it was further *agreed and stipulated*, that A should take, at the rent aforesaid, certain other parcels, as the same might fall in ; and lastly, it was *stipulated and conditioned*, that A should not assign, transfer, or under let any of the said lands and premises otherwise than to his wife, child or children ; it was held, that by the last clause a condition was created for the breach of which the lessor might maintain an ejectment. But the following words in an agreement for letting do not constitute a condition :—“The tenant hereby agrees that he will not underlet the premises without the consent in writing of the landlord.”³ In a lease for years no precise form of words is necessary to make a condition. It is sufficient if such language is used as shows that the parties intended that it should have that effect.⁴ Thus if it is stip-

¹ Wilson v. Phillips, 2 Bing. 13 ; Gardner v. Kennard, 12 Q. B. 244 ; 9 Moo. 46 ; Doe d. Wilson v. Abel, 2 M. & S. 541.

² Gardner v. Kennard, 12 Q. B. 244.

³ Henniker v. Watt, 8 B. & C. 308.

⁴ Shaw v. Coffin, 14 C. B. N. S. 372.

⁵ Henniker v. Watt, 8 B. & C. 315.

ulated and conditioned that the lessee shall not assign or underlet, a condition is created for the breach of which ejectment may be maintained.¹ But the words "yielding and paying" do not create a condition,² nor does a stipulation in a lease not to alter buildings without the lessor's consent, unless the language is such as to show that the parties intended it as a condition;³ nor do mere words of contract amount to a condition unless there is a clause of re-entry.⁴ But even a covenant, if a right of re-entry for its breach attaches, has all the force and effect of a condition,⁵ even though the covenant is negative.⁶

SEC. 281. *Between what parties binding.*—Estates made by deed to infants and married women upon condition are binding upon them, *because the charge is on the land.*⁷ The heir, though not named, may take advantage of a condition annexed to a real estate: and where the condition of an obligation was to make a lease or pay a certain sum as a penalty, the obligee dying, though the election was taken away, it was held, that the executor should have the penalty, agreeably to the rule in case of heirs.⁸

SEC. 282. *Schedules, indorsements, &c.*—*Schedule of fixtures, furniture, &c.*—*When part of the lease.*—When a house is let, together with fixtures, furniture or other articles therein, it is usual to make a schedule or inventory thereof, with a covenant or promise from the lessee to re-deliver them at the end of the term. Such covenant or promise will give the landlord a better remedy (with clearer evi-

¹ *Henniker v. Watt*, ante; *Co. Lit.* 205 b; *Simpson v. Literell*, *Cro. Eliz.* 242; *Pembroke v. Berkeley*, id. 384; *Harrington v. Wise*, id. 486. But while the tenant under such a provision cannot assign or underlet, yet he may associate others with him in the occupancy without incurring a forfeiture; or, if the provision merely provides that he shall not assign, he may underlet. *Hargrave v. King*, 5 *Ired. (N. C.) Eg.* 430.

² *Delancy v. Ganong*, 9 *N. Y.* 9.

³ *Jackson v. Harrison*, 17 *John. (N. Y.)* 66.

⁴ *Crawley v. Rice*, *L. R.*, 10 *Q. B.* 302; *Shaw v. Coffin*, 14 *C. B.* *N. S.* 372.

⁵ *Jackson v. McLellan*, 8 *Cow. (N. Y.)* 295.

⁶ *Wadham v. Post Master Genl.*, *L. R.*, 6 *Q. B.* 644.

⁷ 2 *Danv.* 30.

⁸ *Hodgson v. Rawson*, 1 *Ves. sen.* 47; *Anon.*, 1 *Salk.* 170.

dence) than he would otherwise have.' The schedule or inventory is generally written at the foot or end of the lease, or it is indorsed thereon, or annexed thereto; in either case it forms part of the instrument and must be counted (figures as words) in estimating whether any and what progressive duty is payable. But when any schedule, inventory or catalogue is separate and distinct from the lease, and not indorsed thereon or annexed thereto, but *only referred to*, it is not to be counted as part of the lease.'

If a schedule referred to in a deed as annexed thereto is not in fact annexed when the deed is executed, yet the deed will operate and take effect, so far as may be, without the assistance of the schedule.' But if it is insensible as to the part without the aid of the schedule, it will be inoperative.' The articles comprised in the schedule should be specified in such a manner as to prevent all doubt as to what was intended to be included.' When they are numerous and comprise items of small value, the operative words should be general enough to include all the property after which may be added "the principal articles whereof are particularly enumerated and described in the schedule hereunder written, or hereunto annexed," or to that effect.' But sometimes the schedule may be referred to in such a manner as to exclude anything not therein specified.' A deed is not avoided by subsequently annexing the schedule therein referred to.'

The usual attestation clause should not be omitted, especially when the lease is granted in pursuance of a power. Alterations in the deed should be specially mentioned in the attestation, or marked in the margin with the initials of the attesting witnesses.'

¹ Dampier v. Pole, 4 Exch. 678.

² Sneezum v. Marshall, 7 M. & W. 417; 9 Dowl. 267.

³ Dyer v. Green, 1 Exch. 71; Dames v. Heath, 3 C. B. 938; Dampier v. Pole, 4 Exch. 678.

⁴ Weeks v. Maillerdet, 14 East, 568.

⁵ Wood v. Rowcliffe, 6 Exch.

407; Cort v. Sagar, 3 H. & N. 370;

Hutchinson v. Kay, 23 Beav. 413; cited 3 H. & N. 372; Baker v.

Richardson, 4 W. R. 663, Q. B.;

Walsh v. Trevanion, 15 Q. B. 733;

Barton v. Dawes, 10 C. B. 261.

⁶ Dyer v. Green, 1 Exch. 71.

⁷ Wood v. Rowcliffe, 6 Exch.

407; Baker v. Richardson, 6 W.

R. 663, *contra*.

⁸ West v. Stewart, 14 M. & W. 47.

⁹ Dames v. Heath, 3 C. B. 938;

Dyer v. Green, 1 Exch. 71.

SEC. 283. Alterations indorsed before the lease is executed. It sometimes happens that after a lease has been made, but before it is executed, some additional covenant or stipulation is agreed on, which cannot conveniently be interlined. In such case it may be *indorsed* on the lease, and referred to in the proper place, thus :—"See back (A)." Memorandums indorsed upon leases, if made previously to the execution of the lease, are considered in construction and effect as part of the instrument, although they add to or change the provisions of the deed.¹ An indorsement upon a deed, or other alteration therein, shall be taken to have been made before the execution of the deed and to be parcel of it, in the absence of proof to the contrary.² It is no objection to a lease that an alteration therein was made and signed after the lease was signed, but *before* it was sealed and delivered.³ In England, it is held that a memorandum indorsed upon a lease *after* its execution, although it refers thereto, is a new instrument and must be stamped as such.⁴ The terms of a lease may be changed by parol. If a written lease provides that the lessor shall provide the tenant a certain staircase, and he fails to do so, but agrees orally to permit him to use a certain existing staircase, it is held that the oral agreement is good, and if the landlord deprives the tenant of the use of such existing staircase, he is liable to the tenant for such damages as he sustains from its breach.⁵

¹ Griffin v. Stanhope, Cro. Jac. 456; Goodright d. Nicholls v. Mark, 4 M. & S. 80; Frogley v. Earl Lovelace, 1 Johns. 338. In Preston v. Huntington, (Mich.) 10 Westn. Rep. 875, at the time of the execution of a lease, a person executed upon the back thereof, under seal, an agreement to become surety. The court held that he might be sued jointly with the lessees for the rent, and it was also held that a reduction of the rent from \$75 to \$50 a month did not affect his liability.

² Brewster v. Kidgell, Carth. 438; Flint v. Brandon, 1 Bos. & P., N. R. 73; Doe d. Tatum v. Catamore, 16 Q. B. 745. But the presumption is the other way with respect to a will or codicil. Doe d.

Shallcross v. Palmer, 16 Q. B. 747; Cooper v. Bockett, 4 Moo. P. C. C. 419; Cole Ejec. 504.

³ Lyburn v. Warrington, 1 Stark. 162.

⁴ Reed v. Deene, 7 B. & C. 261; French v. Patten, 9 East, 351; Hill v. Patten, 8 id. 378. The courts in Pennsylvania hold that a lease under seal may be modified by a parol agreement where there is a sufficient consideration therefor, and an agreement to change the time for the payment of the rent from the first to the last day of the month, was binding. Wilgus v. Whitehead, 89 P. M. St. 131. But see Louch v. Farnum, 90 Ill. 368.

⁵ Blumenthal v. Bloomingdale, 100 N. Y. 558.

Where lease recites that the lessee is to pay a certain sum as rent for the premises, his acceptance of the lease makes him a direct obligor or promisor to pay the rent, although he has not signed or executed the instrument.¹ Such an instrument is not an unilateral contract.

An agreement contained in a deed poll will be enforced, notwithstanding that it is an of unilateral nature.²

The promise to pay rent is a sufficiently valuable consideration for the promise to lease.³

¹ Kershaw v. Kershaw, 102 Ill. 807; Atlantic Dock Co. v. Leavitt, 54 N. Y. 85; Suchmuker v. Sibert, 18 Kan. 104.

² Otaway v. Braithwaite, 1 Finch, 405; Butler v. Powis, 2 Col. (Mass.)

156. See also Old Colony R. Co. v. Evans, 6 Gray 25.

³ Chitty Cont. 11th Am. ed. 50, note d; McFarlane v. Williams, 38 Ill.

CHAPTER XXVIII

THE ESTATE.

- SEC. 284. Habendum.—Office of.
 SEC. 285. Commencement of term.
 SEC. 286. Commencement from the date of the lease.
 SEC. 287. Commencement with reference to entry.
 SEC. 288. Duration of terms for years.—What certainty is requisite generally.
 SEC. 289. Certainty with reference to collateral matters.
 SEC. 290. Where there is an optional number of years fixed.
 SEC. 291. Where there is a recurring number of years.
 SEC. 292. Where the term depends on a contingency.
 SEC. 293. Leases for life or lives.
 SEC. 294. Reddendum.
 SEC. 295. Rent payable in advance.
 SEC. 296. Certainty as to amount of rent.
 SEC. 297. Mode of reservation.
 SEC. 298. "Net rent."

SEC. 284. Habendum—Office of.—The office of an habendum in a lease, is to point out with certainty, and limit, the estate conveyed.¹ But it cannot cut down the grant so as to change the nature of the estate or interest mentioned

¹ Shep. Touchstone, 75. The *habendum* is that part of a deed or lease that begins with the words "to have and to hold," and immediately succeeds the premises. In 4 Cruise's Digest, title 82, Deed Ch. 21, it is said, "With respect to the habendum, its office is to limit the certainty of the estate granted; therefore no person can take an immediate estate by the habendum of a deed, where he is not named in the premises: for it is in the premises of a deed that the thing is really granted," and in

the same work, Sect. 76, p. 273, the author continues: "If lands are given in the premises of a deed to A and his heirs, *habendum to A for life*, the habendum is void, because it is utterly repugnant to and irreconcilable with the premises," and the author cites *Throckmorton v. Tracey*, Plowd. 145. In *Stockton v. Martin*, 2 Bay (S. C.) 471, the court define an habendum to be "that part of a deed which limits the use of the thing conveyed." In general, the *habendum* refers to the premises, and declares the es-

in the premises.¹ Thus, in the case last cited, land was conveyed to W in fee, but the habendum was, "to have and to hold to him the said W in fee, *after the death of H,*" and it was held that W took an *immediate* fee, and that the habendum could not cut down the grant so as to make the whole a freehold conveyance; and ABBOTT, C. J., in delivering an opinion in the case, very aptly summarized the office and force of an habendum. He said: "*if no estate be mentioned in the premises, the grantee will take nothing under that part of the deed, except by implication and presumption of law; but if an habendum follows, the intention of the parties as to the estate to be conveyed will be found in the habendum, and consequently, no implication or presumption of law can be made; and if the intention so expressed be contrary to the rules of law, the intention cannot take effect, and the conveyance will be void. On the other hand, if an estate be mentioned in the premises, the intention of the parties is shown, and the deed may be effectual without any habendum; and if an habendum follows which is repugnant to the premises, or contrary to the rules of law and incapable of a construction consistent with either, the habendum will be rejected and the deed will stand upon the premises.*"² As stated by ABBOTT, C. J., where the habendum is *repugnant* to the premises, it is void; but where it merely qualifies them, it will be effective. LORD COKE

tate which the grantee shall hold in them, but it may sometimes enlarge or diminish the grant, when it is so worded as to show a clear intention to do so. *Corbin v. Healey*, 20 Pick. (Mass.) 514. And it may qualify, expound or vary the estate given by the premises. *Moss v. Sheldon*, 8 M. & S. (Penn.) 160. Where, in a deed for land, a life estate only is mentioned in the premises and the *habendum*, this cannot be enlarged into a fee, either by a warranty in fee, or by a covenant for quiet enjoyment to the grantee and his heirs. *Snell v. Young*, 8 Ired. (N. C.) 879.

¹ *Dodwell v. Gibbs*, 5 B. & C. 709.

² See also *Timmis v. Steele*, 4 Q.

B., where a tenant in fee conveyed lands to "Hannah Timmis, her heirs and assigns," with an habendum "to have and to hold to H and her assigns for and during the natural life of George Timmis." The executors of Hannah Timmis claimed that the effect of the habendum was to qualify the estate named in the premises, so as to give the same to her executors during the balance of the life of George Timmis, instead of to George Timmis her heir. But the court held, that after Hannah Timmis' death the heirs took the estate, LORD DENMAN, C. J., saying; "The words in the habendum are manifestly contradictory and repugnant to the words in the premises, and

says: "The office of the premises is two-fold: first, rightly to name the feoffor and the feoffee; and, secondly, to comprehend the certainty of the lands or tenements to be conveyed by the feoffment, either by express words, or which may by reference be reduced to a certainty; for *certum est quod certum reddi potent*." The habendum hath also

must, according to the general rule of construction in such cases, be disregarded." The only case to be found where the habendum has been permitted to change the legal effect of the premises is *Spyve v. Topham*, 8 East, 115, in which the words in the premises were "to J. Topham, his heirs and assigns," and those in the habendum were "to G. Bass, his heirs and assigns." The deed was a release: and the lease for a year was to G. Bass. In the release Bass was described as trustee for Topham. The words "J. Topham" in the premises, from an inspection of the whole instrument, was evidently a clerical error. If effect had been given to them, nothing could have passed to anyone by the release, and the whole purpose and object of the parties would have been defeated. The court, therefore, read the release as if the words in the premises had been "G. Bass" instead of "J. Topham." LORD ELLENBOROUGH, C. J., saying that the cases cited were sufficient to authorize the court in putting a construction upon the deed in support of it, "which, from the good sense of the thing, we should probably have done without such authorities." The case was determined upon its peculiar circumstances, and, as was said by LORD KENYON, in *Timmis v. Steele*, ante, referring to it, "is no rule for any case not exactly like it."

¹ Co. Litt. 6 a. PATTERSON, J., in *Timmis v. Steele*, 4 Q. B. 666, said: "If a man give land to me and *my heirs*, habendum to me and *the heirs of my body*, there is no repugnancy because the habendum explains the sense in which the word 'heirs' is used."

² The office of the premises in a deed is to state the parties, the description of the property, and the grant; that of the habendum is to limit the estate with certainty. 2

Rolle's Abr. 65; *Wrastly v. Adam*, Plowd. 196 a; *The Earl of Shrewsbury's Case*, 9 Coke, 47 b; 1 Inst. 6 a; 2 id. 240. It follows, therefore, that, if the premises grant an estate at will, the habendum may enlarge it into an estate for years, or that, if an estate for years or for life is given, it may enlarge it into a fee. 1 Inst. 299 a; 2 id. 584; Poph. 138. Thus, if lands are granted to A and the heirs of his body, habendum to him in fee, he has by the premises an estate tail, and by the habendum a fee simple expectant thereon. *Altham's Case*, 8 Coke, 154 b; *Turnham v. Cooper*, Cro. Jac. 476; *Beck's Case*, Litt. 345; *Comyn's Dig. Fairs* (E.) 9; *Doe v. Ellis*, 9 East, 386; *Anonymous*, Moore, 26; *Corbin v. Healey*, 20 Pick. (Mass.) 514; *Sanderson Uses*, note 1. The rule is, that, where a deed at the first contains special words, and afterwards concludes with general words, both shall stand, but, while subsequent words may qualify and abridge, they shall not destroy the generality of precedent words *Dyer*, 56; *Altham's Case*, 154 b; *Thomas v. Howell*, 4 Mod. 69; *Viner's Abr. Grants H.* 13, pl. 41 et seq.; *Payler v. Hamershaw*, 4 M. & S. 427. The habendum may qualify and restrain the import of words in the granting part of the premises. Thus, when the grant is to A and his heirs, habendum to him and the heirs of his body, or to him during the lives of B and C, the habendum qualifies the premises so as to restrain the grant therein to the heirs described in the habendum, so that in the one case the grantee will take an estate tail, and in the other a descendible freehold. *Mortimer's Case*, 8 Coke, 154 b; *Pillsworth v. Pyatt*, T. Jones, 4; 1 Inst. 21 a; 2 *Sanders' Uses*, 260; *Preston's Shep. Touch.* 118. If no express estate is granted in the premises, but it is defined

two parts, to wit : first, to name again the feoffee ; and, secondly, to limit the certainty of the estate."¹ It cannot

in the habendum, the estate named in the habendum will control it to that extent, qualifies the intendment of the premises. 3 Bacon's Abr. Tit. Feoffment (C) ; 2 Rolle's Abr. Tit. 65 ; Hogg v. Cross, Cro. Eliz. 254. If the grant is to two, the habendum may limit a moiety to one and the other moiety to the other, and make them tenants in common, even though by the premises they were joint tenants. 1 Inst. 183 b, 190 b, 772 ; 2 id. 241 ; Comyn's Dig. Fait. (E) 9. But, although the habendum is allowed to ascertain and fix the meaning of the premises, it must not contradict them, Cocking v. Heathcote, Lofft. 191, or be repugnant thereto. Thus, if an estate in fee is expressly given in the premises, an habendum to the grantee for his own life, or to him and his executors and administrators, or for years, will be repugnant and void, and the grantee will take the estate in fee notwithstanding the habendum. So if a grant is to two, an habendum to one for life, remainder to the other for life, is void, because by the premises they are made joint tenants, and the habendum severs the jointure. Where the premises and the habendum are equally clear, the former will not be controlled by the latter, but both will be allowed to have an operation when it can be done without conflicting with the evident intent of the parties, in accordance with the rule that a deed shall be construed in such a manner that each part shall be made effectual if they can stand together. Shelly's Case, 1 Coke, 95 b ; 1 Inst. 21 a ; 1 Wood's Conveyancing, 224 a. But where there are words in a deed evidently repugnant to each other, and to the general intention of the parties, they will be rejected. Barrington v. Parkhurst, 3 Atk. 185. Or if words are omitted by mistake, they will be supplied. Lloyd v. Say, 1 Salk. 841 ; Uredall v. Halfpenny, 2 P. Wms. 151 ; Targus v. Paget, 2 Ves. 194. And the courts will modify in construction the different parts of an instrument, so

as to carry the intention of the parties into effect, so far as it can be done without doing violence to any rules of law. Spyne v. Topham, 8 East, 115. But when the habendum is repugnant to the premises, it is void, Baldwin's Case, 2 Coke, 28 b, upon the principle, or rather under the rule that, where there are two clauses in a deed repugnant with each other, the *first* shall prevail ; Leicester v. Biggs, 2 Taunt. 118 ; and every deed is construed most strongly against the grantor and most for the advantage of the grantee ; therefore the grantee will take under the premises *if that is most favorable to him*, and not by the habendum, because the grantor having given the estate, cannot by any subsequent words detract from it, 1 Inst. 299 a, but he may add to it by the habendum, and such addition will inure to the benefit of the grantee. Where the grant in the premises admits of two meanings, the habendum will control, as where a grant is made to a man and his heirs, habendum to him *and the heirs of his body* ; here the word heirs being an equivocal term, applicable either to general or special heirs, the habendum properly explains the sense in which it is used. 1 Wood's Conveyancing, 200 n. When the habendum clause in a deed is contradictory to the premises, it is void, but when it simply explains, limits or qualifies the premises, it performs its proper office. Congregational Society v. Stark, 84 Vt. 243. The word appurtenances in the habendum of a deed, when none are specified, will not convey anything except what was legally appurtenant to the land in the hands of the grantor ; and therefore will not convey an easement in the land of another, which, by reason of not having ripened into a legal right, had not become legally attached to the premises conveyed, unless properly described by words. Swazy v. Brooks, 84 Vt. 451.

¹ See Cocking v. Heathcote, Lofft. 190 ; Bird v. Baker, 1 E. & E. 12,

introduce parcels not named in the premises. Thus, if a brick house is demised, habendum together with *another* house, the other house not having been named in the premises, will not pass under the lease. But if a thing is comprehended in the premises, the fact that it is called by a different name in the habendum does not invalidate the latter, for the estate is the same.¹ If some parcels are named in the premises, but not included in the habendum, the operation of the deed as to those depends upon the premises, the same as though the deed contained no habendum.² The object of the habendum is not to designate the parties who take under the grant, but to designate and limit the quantity of interest conferred.³ If the lessee is not named in the premises, but is named in the habendum, the lease will be good ;⁴ and such is also the case if he is named in the premises, but not in the habendum.⁵ If the lessee *is* named in the premises, another person cannot take under the lease who is named in the habendum, but not in the premises,⁶ except by way of remainder, nor then, unless the order of succession is clearly pointed out.⁷ Neither the premises or the habendum are anything more than formal parts of a deed ; and if either or both be omitted, the deed will be good ;⁸ but either or both, when used, exercise, as we have seen, a most important influence upon the construction of the deed, and great care should be taken to give to each the efficacy and purpose for which they are employed. An ignorant or careless conveyancer may so use them as to defeat entirely the intention of the

upon the point, and holding that the habendum fixes the quantity and quality of the estate and ascertains the meaning of the premises, but cannot contradict or defeat them. *Ashton v. Underhill*, Cald. 416.

¹ *Neld v. Cooper*, Toth. 186 ; *Throckmorton v. Tracey*, Plowd. 158 ; *Shep. Touch.* 76 ; 2 *Rollin's Abr.* 65 (J) pl. 2.

² *Platt on Leases*, 48.

³ *Becklin's Case*, 2 *Coke*, 53 a ; *Lofield's Case*, 10 *id.* 107 b ; *Strickland v. Maxwell*, 2 *Cr. & M.* 539.

⁴ *Butler v. Doddington*, Toth. 194, *S. C. sub nom* ; *Butler v. Dodson*, Gary, 122 ; *Ellis v. Lambert*, Al.

88 ; *Co. Litt.* 7 a ; *Shep. Touch.* 75 ; *Cruise's Dig.* 290 ; 1 *Preston's Abstracts*, 79. But *contra*, and holding that if the lessee is named only in the habendum the lease is inoperative. See *Anonymous*, 8 *Leon.* 32 ; 2 *Rolle's Abr.* 66, pl. 13, tit. Grants ; *Bustard v. Coulter*, *Cro. Eliz.* 902.

⁵ *Anonymous*, 8 *Leon.* 32.

⁶ *Windsmere v. Hobart*, Hob. 318 ; *Kirkman v. Reignold*, 2 *Leon.* 1 ; *Haffner v. Irwin*, 4 *Dev. & B. (N. C.)* 433.

⁷ *Windsmere v. Hobart*, ante ; *Wheadon v. Sugg*, *Cro. Jac.* 372.

⁸ *Inst.* 7 a ; *Sheppard's Touchstone*, 75.

parties, while, if properly used, they are instrumentalities through which the intention of the parties is effectuated and made clear.

SEC. 285. *Commencement of term.*—Certainty of commencement, of duration, and of termination, is essential to the validity of a lease for years,¹ but this applies to certainty of the time when the interest or enjoyment under the lease is to begin, rather than to commencement in computation of time, as the two do not necessarily run together. Thus, a lease for years may be made to commence *in interest* from a future day, although in computation of time it commences from its date.² So a lease in computation of time may be made to commence from a day past, although it is not to commence in interest until a future day, or until the happening of a certain contingency.³ A lease for five years,

¹ Co. Litt. 45 b; Foote v. Berkeley, 1 Vint. 88; Chidington's Case, 2 Coke, 156 a; 4 Bacon's Abr. Leases, 55; 2 Blackstone's Com. 148; Sheppard's Touchstone, 271; Comyn's Dig. Tit. Estates (G) 8; Say's Case, Plowd. 270. A lease becomes operative from the day of its execution and delivery, in the absence of any words fixing a different period, and not from the date of the lessee entry, *Chung You v. Hop Chong*, 11 Or. 220.

² *Enys v. Donnithorne*, 2 Burr. 1190. In the *Bishop of Bath's Case*, 6 Coke, 85 a, it was resolved by the court that "every lease for years should have a certain beginning is to be intended *when it is to take effect in interest or possession*. A lease for years, being a mere chattel interest, may be made on a condition or contingent precedent: as, if I grant to you that, if you pay me twenty pounds at Michaelmas next following, you shall have my manor of D for one and twenty years; now it is uncertain whether it will commence or not, and in the meantime, until the payment of the money, it is not any lease, but it is sufficient that the commencement by certain when it is to take effect in interest or possession. So it is true that

the continuance of it ought to be certain; but that it is to be intended either when the time is made certain *by express numbering of years, or by reference to a certainty, or by reducing it to a certainty by matter ex post facto, or by construction in law by express limitation*. At first, if a lease be made for twenty-one or any other certain number of years, it is good for the certain enumeration from the first." See also *Boraston's Case*, 19 a; Co. Litt. 45 b; Roll. Arb. 849; *Say v. Smith*, Plowd. 271; *Shep. Touch.* 278. Until the former lease terminates, the second lease has a mere *interesse termini*, and such lease does not operate as an assignment of the reversion expectant on such lease. *Smith v. Day*, 2 M. & W. 684; *Locke v. Furze*, 19 C. B. N. S. 96. But, after the day appointed for the commencement of the term, an *interesse termini* is sufficient to support an entry or ejectment. *Agar v. Brown*, 2 E. & B. 881.

³ In *Enys v. Donnithorne*, 2 Burr. 1192, a lease to hold from a day past, for fifty years therein next ensuing, the said term to commence and begin from and immediately after the surrender, forfeiture, or other determination of an

to commence upon the death of a person then living, is good; for, although it is uncertain when the term will begin, yet it is reduced to a certainty by the death of the person named, and is aided by the maxim *id certum est quod certum reddi potest*.¹ So, if one leases premises "as many years as A has" other premises, the lease is good for a term as long as that which A has in the premises named.² So, if a lease is made during the minority of a person named,³ or for a certain term, to commence at the lessor's death,⁴ or, indeed, upon any *possible* event or contingency;⁵ but a lease made upon a contingency that is impossible, or that is dependent upon another contingency, is bad.⁶ A lease for such a period as a certain person, designated in the lease, shall name,

existing lease of the same premises, was held not uncertain in its commencement, and was upheld as a void lease. On the determination of the former lease, either from efflux of time, surrender, forfeiture, or any cause, the second lease *immediately takes effect in possession*, for the residue of the term: for, on its creation it was good as a present demise, by reason of the estoppel to both parties, by the indenture, and therefore shall come into possession whenever the first lease is out of the way. 4 Bacon's Abr. Leases (N.); Read v. Ervington, Cro. Eliz. 322. But by the common law, before the Statute 4 & 5 of Anne, chap. 16, attornment was requisite to make the second demise enure as a lease of the reversion so as to entitle the second lessee to the rents and services reserved on the first lease, unless it was by way of bargain and sale for years. Malorie's Case, 5 Coke, 118, 1 Inst. 309 a; 812 a; 2 Inst. 856 n. (B.) In some measure, attornment was avoided by the Statute of Uses, 27 Hen. 8, chap. 10, and by the Statute of Wills, 35 Hen. 8, chap. 5; but it was not until the Stat. of Anne previously referred to, and 11 Geo. 2, chap. 19, that this formality was almost entirely dispensed with. Previous to the Statute of Anne, *supra*, if the second demise was

by deed poll, without such attornment, it could only take effect in possession upon the determination of the first lease, *by the death of the first lessee*, according to the express limitation, and did not become operative upon its determination by surrender or forfeiture, or other cause; for during the first lease the lessor had no power to contract for anything but his own reversion; and therefore, unless the second lessee could obtain the reversion *by attornment*, the contract could not take effect until the death of the first lessee; and the same was true in reference to parol leases, which, prior to the Statute 29, Car. 2, chap. 3, enured by way of *interesse termini* for such part of the time as was not named in the former lease.

¹ Hall v. Richardson, 3 T. R. 462; Child v. Baylie, Cro. Jac. 459; Grute v. Locroft, Cro. Eliz. 287; Anonymous, Poph. 4.

² Co. Litt. 45 b; 1 Roll. Ab. 849; The Bishop of Bath's Case, 6 Coke, 85 a.

³ Braston's Case, 3 Coke, 19 b; Say v. Smith, Plowd. 273 a 8.

⁴ Grute v. Locroft, Cro. Eliz. 287; Herbin v. Chard, Poph. 97; Chedington's Case, 1 Coke, 153 a.

⁵ Shep. Touch. 278; The Rector of Chedington's Case, 1 Coke, 156 a.

⁶ Child v. Baylie, Cro. Jac. 461; Chedington's Case, ante.

is inoperative until such person names the duration of the term; but, after the term has been named by him, it attaches as a valid lease *ab initio* for that period.' If a lease is made of premises to commence when a former lease recited therein is ended, and in fact no such lease exists, the lease will attach and the term commence immediately; but if there is a former lease, but it has been mis-recited in an essential respect in the second lease, the second lease will have merely an *interesse termini*, and his lease can commence presently only in the enumeration of years, and not in interest, until such former lease is determined.'

SEC. 286. Commencement from the date of the lease.—It was formerly held that a lease to commence *a datu* included the day of the date, but that *a die datus* excluded the day; but it is now considered that the words "from the day of the date" mean either *inclusive* or *exclusive*, according to the context and the apparent intention of the parties; and the court will construe them so as to effectuate such intention.' And in

¹ Goodright v. Richardson, 3 T. R. 463. A lease to another until a child *en ventre sa mere* shall arrive at the age of twenty-one years, is not good as a lease for years, but only at will. Say v. Smith, Plowd. 271; Bishop of Bath's Case, 6 Coke, 85 b; 4 Bacon's Abr. tit. Leases (L) 3.

² 4 Bacon's Abr. Tit. Leases (L) 1.

³ Co. Lit. 46 b; Rowe v. Huntington, Vaugh. 78.

⁴ Haths v. Ash, 2 Salk. 413; Macdonnell v. Weldon, Stra. 550; Anon., Lofft. 275; Cornish v. Cawsey, Roll. Abr. 850, pl. 12; Douglass v. Shank, Cro. Eliz. 766; Vernon v. West, 2 Wils. 165; Macdonnell v. Weldon, 8 Mod. 54; Llewellyn v. Williams, Cro. Jac. 258; Mellows v. May, Cro. Eliz. 873; Howard's Case, 2 Salk. 625; Bacon v. Waller, 1 Rol. 887; Bayntum v. Watton, Cowp. 723; Bull v. Wyatt, Cro. Car. 836; Osbourn v. Rider, Cro. Jac. 135; Warren v. Fearnside, 1 Wils. 176; Haths v. Ash, 2 Salk. 913. The cases are not uniform. In Bacon v. Waller, ante, "from date" and "from

the day of the date," were held to be one and the same thing. See also, to the same effect, Hicks v. Harvey, Comb. 899; Signorette v. Maguire, 2 Ld. Rayd. 1241. "From the making" has been held to commence only from delivery, Norris v. Gawtry, Hob. 140; Hicks v. Harvey, ante; Anonymous, Dyer, 286 a, pl. 43, and in Barwick's Case, 5 Coke, 94 a, was held to exclude the day of making. See also, Anonymous, Lofft. 275; Umble v. Fisher, Cro. Eliz. 702; Jenk. Cent. 136, case 78, where the word "from" is construed as *excluding* the day of date. "Henceforth" includes the day of date, Llewellyn v. Williams, Cro. Jac. 250, but "from henceforth" passes the estate from the time of the delivery of the lease. Clayton's Case, 5 Coke, 1.

⁵ Pugh v. Duke of Leeds, Cowp. 714; Ackland v. Lutley, 9 Ad. & El. 879; 4 Bac. Abr. Tit. Leases (L) 1; Smith L. & T. 104, 105, (2d. ed.) A lease for a term of years "from the first day of July," begins on the 2d of July. Atkins v.

computing time from an act or event, there is no general rule that the day is to be inclusive or exclusive; but the question whether it shall be included or excluded depends upon the reason of the thing according to the circumstances.¹ And in case of doubt the construction will be made so as to save the right or estate. Thus, where lands were devised to a person upon condition that he should pay a certain sum to a certain person "within one year *after*" the testator's decease, and the testator died Oct. 2, and the devisee tendered the money Oct. 3d, of the next year (the 2d being Sunday) the tender was held in time, the court saying; "There is no invariable sense, however, to be attached to the word '*after*,' when used in such a connection, *but it is to be taken to be exclusive or inclusive, according as it will, in the particular case, effectuate the intention of the parties*; and in ascertaining that intention, the context and the subject matter are to be regarded, as well as the effect of the construction to uphold or destroy the instrument in question, and the rights depending upon it, the presumption being, that instruments are designed to be effectual, and not futile." In cases of doubt, the construction is to be such as will save the right or estate, such being the presumed intention.² And in construing the word "from" a similar rule exists,³ especially when it will prevent an estoppel or save a forfeiture,⁴ and both the day from which the reckoning commences and that on which it terminates may be included or excluded, as best serves the interests of the parties in saving a right or preventing a forfeiture.⁵ A distinction is made be-

Sleeper, 7 Allen (Mass.) 487; Doe v. Smith, Anth. (N. Y.) 179.

¹ Lester v. Garland, 15 Ves. 24; Doe v. Day, 10 East, 427; Sands v. Lyon, 18 Conn. 80; Sims v. Hampton, 1 S. & R. (Penn.) 411; Windsor v. China, 4 Me. 298; People v. Robertson, 39 Barb. (N. Y.) 9; Pel- laer v. Wauford, 9 B. & C. 134; Bennett v. Nichols, 4 T. & R. 121;

² Sands v. Lyon, ante; Kellogg v. Currico, 47 Mo. 157; Protection Life Ins. Co. v. Palmer, 81 Ill. 88; but it is a general rule that where,

by the terms of a contract, an act is to be done within a certain time and the last day is Sunday, performance on Monday is good. Stryper v. Vanderbilt, 35 N. J. L. 68.

³ Cornell v. Moulton, 3 Den. (N. Y.) 12.

⁴ Windsor v. China, 4 Me. 298; State v. Gasconde, 33 Mo. 102.

⁵ State v. Schnierle, 5 Rich. (S. C.) 299; O'Connor v. Towns, 1 Tex. 107.

tween a lease or other contract, where it is to commence from or after a certain act done or from the day itself. In the former case, the day in which the act is done is excluded,¹ but in the latter case the day itself will be included or excluded according to the intention of the parties, or as it will best serve their interests or preserve their rights.² Generally, however, either the first day or the last one will be excluded, and the other included, according to the intention of the parties.³ Generally speaking, a lease from 25th March commences the next day and ends on 25th March, otherwise the day on which the last quarter's rent is usually reserved would be subsequent to the expiration of the lease.⁴ A lease "from the day of the date," and "from henceforth," is the same thing.⁵ Sometimes a lease "from the day of the date" will be construed to mean "from the day of the execution of the deed,"⁶ but the more literal construction is usually adopted.⁷ As to an impossible or uncer-

¹ *Handley v. Cunningham*, 12 Bush. (Ky.) 402; *Protection Life Insurance Co. v. Palmer*, ante; *Lang v. Phillips*, 27 Ala. 811; *Burr v. Lewis*, 6 Tex. 76; *Kimm v. Osgood*, 19 Mo. 60; *Cornell v. Moulton*, ante; *Weeks v. Hull*, 19 Conn. 876; *Windsor v. China*, ante; *Bissell v. Bissell*, 11 Barb. (N. Y.) 96; *Irving v. Humphrey*, *Hop. Ch.* (N. Y.) 884; *State v. Gasconde*, ante; *Homes v. Smith*, 16 Me. 181; *Thorne v. Maasher*, 20 N. J. Eq. 257; *Page v. Waymouth*, 47 Me. 298; *Carruthers v. Wheeler*, 1 Grey, 194; but see *Hampton v. Evenzeller*, 2 Browne (Penn.) 18; *Wagner v. Duffy*, 1 Phila. (Penn.) 367; *Chiles v. Smith*, 18 B. Mon. (Ky.) 460; *White v. Crutcher*, 1 Bush. (Ky.) 472. where it was held that the day on which the act is done is included.

² *Goode v. Webb*, 52 Ala. 452; *Bemis v. Leonard*, 118 Mass. 502; *Wood v. Com.*, 11 Bush. (Ky.) 220; *Corawinger, &c., Co. v. Cunningham*, 75 Penn. St. 138; *Ewing v. Bailey*, 5 Ill. 420; *Bigelow v. Willson*, 1 Pick. (Mass.) 485; *Wiggin v. Peters*, 1 Met. (Mass.) 187; *Bowman v. Wood*, 41 Ill. 208; *Pyle v. Moulding*, 7 J. J. Mar. (Ky.) 202; *Laurent v. Ins. Co.*, 1 N. & M.

(S. C.) 505; *Jacobs v. Graham*, 1 Blackf. (Ind.) 392; *Goswiler's Case*, 8 Penn. 200; *Arnold v. U. S.*, 9 Cranch (U. S.), 104. But see *Shuts v. Selden*, 2 Wall. (U. S.) 190, overruling this case; *Rand v. Rand*, 4 N. H. 267; *Sands v. Lyon*, ante; *People v. New York*, 28 Barb. (N. Y.) 284.

³ *Kendall v. Kingsley*, 120 Mass. 94; *Higgins v. Halligan*, 46 Ill. 173; *Cornell v. Moulton*, 3 Den. (N. Y.) 12; *Farwell v. Rogers*, 4 Cush. (Mass.) 460; *Small v. Edrick*, 5 Wend. (N. Y.) 137. The rule most prevalent is to exclude the first day and include the whole of the last, *Webb v. Fairman*, 3 M. & W. 478; *Sands v. Lyon*, ante; *Hunter v. Sar*, C. S. Co., 4 Mer. 153; *People v. R. R. Co.*, 28 Barb. (N. Y.) 284; *Bemis v. Leonard*, 118 Mass. 502, but this is governed largely by the intention and apparent interest of the parties. *Wiggin v. Peters*, 1 Met. (Mass.) 187; also cases cited, ante.

⁴ *Ackland v. Lutley*, ante; *Wilkinson v. Gaston*, 9 Q. B. 137.

⁵ *Llewelyn v. Williams*, Cro. Jac. 258; *Clayton's Case*, 5 Coke, 1.

⁶ *Underwood v. Horwood*, 10 Ves. 209.

⁷ *Shep. Touch.* 108; *Cox v. Day*,

tain date, there is this distinction, that if a lease is made to begin from an impossible date, as from the 30th of Feb., or the 31st of April, or from the Nativity of our Lord, not saying from the *feast* of the Nativity, especially if it be by deed, *it shall take effect from the delivery*. So if it is dated and is to commence from the "making hereof," or "from henceforth,"¹ or from the executing of a former lease, and no such lease in fact exists, or if the prior lease is void in law;² but where the limitation is uncertain, as a lease made the 10th day of Oct., to hold from the 20th day of Nov., without saying what Nov. is meant, the lease is thereby vitiated, because the limitation is part of the agreement, and the court cannot determine it, not knowing the terms of the contract.³ Where a deed has *no* date, or an *impossible* date, as the 30th of Feb., and in the deed reference is made to the date, that word must be construed "delivery;" but if it has a sensible date, the word *date* occurring in other parts of the deed means the day of the date and not of the delivery; and, therefore, in covenant on an indenture of lease, dated the 24th day of Dec., 1822, whereby the defendant agreed, within twenty-four calendar months then next after the date of the indenture, to procure a certain thing to be done: it was held, that the deed took effect from the day of the date, and that the twenty-four calendar months reckoned from the date.⁴ Where a lease was dated 25th March, 1783, habendum "from the 13th March *now last past*," and it was proved that the deed was not executed until some time after the date, it was held, that the term commenced on the 25th March, 1783, and not in 1782.⁵ A deed having been made in the month of August in a leap year, the words "the 29th February then next ensuing" were construed to mean the 29th February in the next leap

¹ East, 427; Steele v. Mart, 4 B. & C. 272; Styles v. Wardle, id. 908; Cooper v. Robinson, 10 M. & W. 694; Darlington v. Ulph, 18 Q. B. 204; Bird v. Baker, 1 E. & E. 12.

² Co. Lit. 46 b; Styles v. Wardle, 4 B. & C. 908.

³ Miller v. Maynwaring, Cro. Car. 397; Bassett v. Lewis, 1 Lev. 77.

⁴ 4 Bac. Abr. Tit. Leases (L) 1; Anon., 1 Mod. 180; Foote v. Berkeley, 1 Sid. 461.

⁵ Styles v. Wardle, 4 B. & C. 908.

⁶ Steele v. Mart, 4 B. & C. 272.

year.' A lease operates as a grant only from the time of its execution, and the tenant is not liable for previous breaches of covenant, although committed after the date of the deed.' But the duration of the term is to be computed from the day in that behalf mentioned in the lease. Thus, where J by indenture dated and made 19th July, 1851, demised to A certain premises, habendum from 25th Dec., 1849, for fourteen years thence next ensuing, determinable at the end of the first seven years by six months' previous notice: held, that the seven years were to be reckoned from 25th Dec., 1849, and that the lease might be determined on 25th Dec., 1856.'

SEC. 287. *Commencement with reference to entry.*—In general, a letting by parol will be considered to commence from the day of the tenant's entering, and not with reference to any particular quarter-day.' But where a tenant entered in the middle of a quarter, and afterwards paid for that time to the beginning of a succeeding regular quarter, from which time he paid half-yearly, his tenancy was held to commence from the quarter succeeding his entering.' Where, however, the tenant entered in the middle of a quarter, upon an agreement to pay rent "quarterly and for the half-quarter," the jury, under the judge's direction, found that the tenancy commenced from the quarter-day preceding the entry.' A party **having** taken possession on the 1st of August, and at the Michaelmas following paid the half-quarter's rent, and continued afterwards to pay quarterly on the usual feast days, it was held, that a notice to quit at Michaelmas was sufficient; and that although the landlord had at first given notice expiring with the half-quarter, it was not necessarily to be inferred from that circumstance that the tenancy from year to year com-

¹ Chapman v. Beecham, 3 Q. B. 723.

² Shaw v. Kay, 1 Exch. 412; Jervis v. Tompkinson, 1 H. & N. 195, 206.

³ Bird v. Baker, 1 E. & E. 12; 28 L. J. Q. B. 7.

⁴ Kemp v. Derrett, 3 Camp, 510.

⁵ Holcomb v. Johnson, 6 Esp. 10.

⁶ Wadmore v. Selwin, Hill. T. 1807; Adams Ejec. 107 (4th ed.).

menced on that day.' Where a tenant under a lease continued to hold after the expiration of it as a tenant at will, and assigned it to another, the tenancy of the assignee was held to commence at the day on which the original tenancy commenced under the lease, notwithstanding the assignee came in on a different day.'

SEC. 288. Duration of terms for years.—What certainty is requisite generally.—The duration of leases for years is ascertained either by the express limitation of the parties at the time of making, or by reference to some collateral act which may with equal certainty measure their continuance, otherwise they will be void.' And the same rule

¹ *Savage v. Stapleton*, 3 C. & P. 375.

² *Castleton v. Samuel*, 5 Esp. 178.

³ *Bac. Abr. Tit. Leases (L) 3*. It is a rule that, in order to support a lease for years by reference, the reference ought to be to a thing which has express certainty at the time of the lease made, and not to a possible or casual certainty; and, therefore, if the wife of J S be *eniente* and a lease is made until the issue *in ventre sa mere* shall attain twenty-one; *The Bishop of Bath's Case*, 5 Coke, 35 b; or if a lease is made to one who has execution under a statute merchant, until he is satisfied the duty for which he has sued the execution; *Say v. Smith*, *Plowd.* 278; or if a man makes a lease of lands of the value of twenty shillings per annum, till one-and-twenty pounds be levied of the issues and profits; *The Bishop of Bath's Case*, 6 Coke, 35 b; in neither of these cases does the grant amount to a lease for years, on account of the uncertainty; in the first case put, when the son will be born, and in the second, whether the land will continue for twenty-one years of the same annual value. So, if one makes a lease of land for so many years as A B shall be parson of D, it cannot be made certain by any means, for nothing can be less certain than the time of his death, or the period of his ceasing to be parson. *Co. Lit.* 45 b; So, if a demise is made to A for eighty years, and after his death

to B for so many years as shall be then unexpired, it is void for uncertainty, as to B's interest. So, if a grant is made by one possessed of a lease for forty years to B for as many of the years as shall be unexpired at the time of his (the grantor's) death, the lease is void; *The Rector of Chedington's Case*, 1 Coke, 153 a; *Caponhurst v. Caponhurst*, T. Raym. 27; but it is otherwise where the owner of a term of ninety years demises the land for seventy, to commence after his decease; for, to use Mr. JUSTICE GAWDY'S words, so much of the term was granted as should be behind at the time of the grantor's death, which was altogether uncertain in the grant itself; while, in the latter, the land was demised, *habendum* after the death of the lessor for seventy years, in which there was sufficient certainty, and no apparent uncertainty in the deed. And, though a person cannot make a lease of his land for so many years as A B shall continue parson of D, yet he may make a lease for three years, and so from three years to three years, so long as he shall be parson; and the lease will be good for six years, if he continues parson so long, first for three years, and after that for three years, and for the rest uncertain. *Co. Lit.* 45 b. The term may be rendered certain by matter *ex post facto*. *The Bishop of Bath's Case*, 6 Coke, 34 b, 35 b; *Goodright v. Richardson*, 3 T. R. 463. For instance, it

applies to an agreement for a lease, or for an underlease, to save it from the operation of the Statute of Frauds.¹ A lease for "one year certain, and so on from year to year," creates a tenancy for two years at the least.² So a lease "for six months, and so on from six months to six months until determined by either party," creates a tenancy for one year at the least.³ So a demise may be made from two years to two years, or from three years to three years, or the like.⁴ In one case a lease was made, to hold "from seven years to seven years, for and during the term of forty-nine years."⁵ So for seven years, and afterwards from year to year.⁶ An instrument, by which A agreed to let and B to take certain premises, on the terms that B should pay certain specified sums, varying in amount at the end of every three years up to a specified date, and which provided that from and after that date "*he should pay the clear annual rent of 9l. till the end of the lease,*" without mentioning any period at which the lease was to terminate, was held good only for the time previous to the date at which the 9l. was to commence.⁷

may be granted for so many years as A B shall name; and the lease, though uncertain at the beginning, will be valid *ab inito* after the naming of the years. The Bishop of Bath's Case, Hob. 174; Plowd. 6 *ab*; Sparkev. Sparke, Mo. 666; Co. Lit. 45 *b*; 1 Rol. Ab. 849, Estate (Y) 11. The term, however, must be specified in the lifetime of both the lessor and lessee; The Bishop of Bath's Case, ante; Say v. Smith, Plowd. 273 *b*; The Rector of Chedington's Case, 1 Coke, 155 *a*; and, therefore, a lease for so many years as the lessor's executors shall name is void; because no interest can pass out of the lessor during his life; and after his death the naming of the years will come too late. Savel v. Cordell, Godb. 24-5; Porry v. Allen, Cro. Eliz. 173; Perryn v. Allen, Ow. 97. So, where A demised certain lands to B for eighty years, if he so long lived; and if it should happen that B should die or alien the premises within the term, then A granted the

premises to C for so many of the said eighty years as should be then unexpired; and C died in the lifetime of A; it was held that, as the demise to C depended upon a contingency precedent, the interest or term intended to be demised was not certain; that the land was not bound with it; and that, as he died before it was reduced to a certainty, it could never take effect nor vest in his executors. The Rector of Chedington's Case, 1 Coke, 155 *a*.

¹ 29 Car. 2, c. 8, s. 4; Bayley v. Fitzmaurice, 8 E. & B. 664; Clinan v. Cooke, 1 Sch. & Lef. 22; Clarke, app., v. Fuller, resp., 16 C. B. N. S. 24.

² Chadborn v. Green, 9 Ad. & El. 658; Monck v. Geekie, 5 Q. B. 841.

³ Reg. v. Chawton, 1 Q. B. 247.

⁴ Hennings v. Brabason, 2 Lev. 45; Bree v. Lees, 2 W. Blac. 1171; 3 Prest. Conv. 76.

⁵ Richards v. Sedy, 2 Mod. 80.

⁶ Brown v. Trumper, 26 Beav. 11.

⁷ Gwynne v. Maynestone, 8 C. & P. 302.

SEC. 289. **Certainty with reference to collateral matters.**—If a lease of land is made for ten years, with a provision that if at the end of every ten years he shall pay the lessor a certain quantity of tiles, or do any other specific act, then he shall have a perpetual demise of the land from ten years to ten years continually following; it is good for ten years only, and bad as to the rest for uncertainty.¹ So, if a man makes a lease for years, without saying how many, it is good for two years certain; because for more there is no certainty, and for less there can be no sense in the words: 'but if a man leases lands for such a term as both parties shall please, it is only a lease at will.' A tenancy from year to year is determinable at the end of the first as well as of any subsequent year, unless in creating the tenancy the parties use words showing that they contemplate a tenancy for two years at least.⁴ If premises are taken "for twelve months certain, and six months' notice to quit afterwards," the tenancy may be determined at the end of the first year by a six months' previous notice to quit.⁵ A lease for one year, and so on from year to year until the tenancy thereby created shall be determined as after mentioned, with a provision that either party may determine the tenancy by three months' notice, creates a tenancy for two years certain. A demise for a year, and so from year to year, is a lease for two years certain at least.⁶ So, if a parson makes a lease for a year, and so from year to year as long as he continues parson, or as long as he lives, it is a lease for two years at least, if he lives or continues parson so long.⁷ So, a lease "for the term of six months from the 1st of January, and so on for six months to six months," until

¹ Say v. Smith, Plowd. 271.

² Bishop of Bath's Case, 35; 4 Bac. Abr. Leases (L) 3.

³ 4 Bac. Abr. tit. Leases (L) 3; Bishop of Bath's Case, *supra*; Com. Dig. Estates (H) 1; Richardson v. Langridge, 4 Taunt. 128; Cole Ejec. 448.

⁴ Clarke v. Smaridge, 7 Q. B. 957; Plumer v. Nanby, 10 Q. B. 478; 4 Bac. Abr. tit. Leases (L) 3; Agard v. King, Cro. Eliz. 775;

Legg v. Studwick, 2 Salk. 414; Denn v. Cartwright, 4 East, 29, 32; Harris v. Evans, 1 Wils. 262; Birch v. Wright, 1 T. R. 380; Fox v. Nathan, 32 Conn. 348.

⁵ Thompson v. Maberly, 2 Camp. 573.

⁶ Chadborn v. Green, 9 Ad. & El. 658; Monck v. Geekie, 5 Q. B. 841.

⁷ 4 Bac. Abr. tit. Leases (L) 3.

six calendar months' notice is given, the first payment of rent to be on the first of July, is a tenancy for twelve calendar months at least.¹ In legal proceedings, the word "months" means lunar months, unless the contrary appear to be the meaning from the subject-matter to which that term is applied.²

SEC. 290. *Where there is an optional number of years fixed.*
—A lease "for seven, fourteen or twenty-one years, as the lessee shall think proper," is good for at least seven years,³ and a lease made in 1785, for "three, six or nine years, determinable in 1788, 1791 or 1794," is good for nine years, determinable at the end of three or six years.⁴ But the lessee alone has the option to determine such a lease at the earlier periods, on the ground that every doubtful grant must be construed in favor of the grantee.⁵ The usual form of making such leases is to insert the full term in the habendum, and add a proviso at the end for one or either of the parties to put an end to the term at the shorter periods. If the option is given expressly to each party, the lease may be determined by either, or by his representative entitled to the reversion or term;⁶ and where the option was given to the respective parties, their executors and administrators, it was held that the devisee of the lessor might determine the lease.⁷ But where the lease contained a proviso that if either of the parties, their respective heirs or executors, should wish to put an end to the term at the end of seven or fourteen years, six months' notice in writing should be given under "his or their respective hands," and the lessor died, leaving three executors; it was held, that a notice signed by two of them only, although given on behalf of themselves and the other executor, was not a good notice within the terms of the proviso.⁸ A lease for twenty-one

¹ Reg. v. Chawton, 1 Q. B. 247; Simpson v. Margison, 112 B. 23.

² Johnstone v. Hudlestone, 4 B. & C. 922.

³ Ferguson v. Cornish, 2 Burr. 1032.

⁴ Goodright v. Richardson, 3 T. R. 462.

⁵ Dann v. Spurrier, 3 B. & P. 399;

Webb v. Dixon, 9 East, 15; Price v. Dyer, 17 Ves. 356; Cole Ejec. 398.

⁶ Goodright v. Mark, 4 M. & S. 30; Bird v. Baker, 1 E. & E. 12.

⁷ Bamford v. Hayley, 12 East, 464.

⁸ Right v. Cuthell, 5 East, 491; Aslin v. Summersett, 1 B. & Ad. 137.

years, expressed to "be determinable nevertheless in seven or fourteen years if the said parties hereto shall so think fit," is determinable only by consent of *both* the parties, although it may have been their intention to give the option to either of them.¹ The notice must end with the first seven or fourteen years (or other stipulated period), according to the terms of the proviso, and not at any other time.² It must not end *at noon* on the right day.³ Sometimes it is made a condition precedent that the tenant shall not only give the notice, but also pay all the rent, and perform all the covenants on his part, to the termination of the notice.⁴ But such a condition is unreasonable, and ought to be objected to in the first instance, or it will be binding.⁵ A lease for three, seven or ten years, determinable on notice, stipulated that a quarter's rent should be paid by the tenant on taking possession, the same to be allowed him for the last quarter's rent, "on the determination of the said tenancy;" after a notice to determine the lease at the expiration of the third year had been given, and before its expiration, the parties verbally agreed that the party should continue tenant for another year, no express mention being made of the terms of the tenancy; it was held, that the tenant continued to hold subject to the terms of the original lease, and consequently that the payment on taking possession was applicable to the last quarter of the fourth year.⁶

SEC. 291. Where there is a recurring number of years.—If a lease is made for twenty-one years, with a further covenant by the lessor, "that the lessee shall have the same for twenty-one years more after the expiration of the said term, and so from twenty-one years to twenty-one years, until ninety-nine years thence next ensuing shall be complete and ended," the first twenty-one years will

¹ *Fowell v. Frank*, 3 H. & C. 458.

² *Cadby v. Martinez*, 11 Ad. & El. 720; *Bird v. Baker*, 1 E. & E. 12; *Cole Ejec.* 898.

³ *Page v. More*, 15 Q. B. 684.

⁴ *Friar v. Grey*, 5 Exch. 584, 597; *Friar v. Grey*, 15 Q. B. 891; *Parker v. Shepherd*, 6 T. R. 665.

⁵ *Cole Ejec.* 897.

⁶ *Finch v. Miller*, 5 C. B. 428.

not be reckoned as a part of the ninety-nine years.¹ So, where a lease is made for three years, and so from three years to three years until ten years expire, it is a lease for nine years only, and the odd year is rejected, because it could not come to fall within any three entire years according to the limitation.* Where a lease was made of freehold and copyhold lands at an entire rent, to hold so much as was freehold for twenty-one years and so much as was copyhold for three years, and there was a covenant for renewal of the lease of the copyhold every three years *toties quoties* during the twenty-one years under the like covenants; and that in the mean time, and until such new leases should be executed, the lessee should hold the said lands, as well copyhold as freehold, &c.; it was held, that this was only a lease of the copyhold for *three years*, and that the lessor, after the three years, might recover the premises in ejectment against the lessee, there not having been any fresh lease granted.*

SEC. 292. Where the term depends on a contingency.— Sometimes a term is limited conditionally, as for ninety-nine years if the lessee or some other person or persons therein named shall so long live,⁴ and where one made a lease for forty years, “if his wife *or* any of their issue should so long live;” it was held, that the lease was not determined by the death of one of them, but continued until all were dead, by reason of the disjunctive *or*, which goes to and governs the whole limitation: but if the words had been “if his wife *and* issue should so long live,” then clearly, by the death of any of them within the forty years, the term would have been at an end, by reason of the copulative *and*, which conjoins all together, and makes *all* their lives jointly the measure of the estate.⁵ If a lease is made to two for years, if they so long live, it determines by the death of one of them, because their life is but a collateral condition and limita-

¹ Manchester College v. Trafford, 2 Show. 81.

² 4 Bac. Abr. tit. Leases (L) 8; Say v. Smith, Plowd. 273, 522 a.

³ Fenny v. Child, 2 M. & S. 255.

⁴ Hughes and Crowther's Case, 18 Coke, 66; Brudnell's Case, 5 Coke, 9 a; Cole Ejec. 402.

⁵ Co. Lit. 225; a; Lord Vaux's Case, Cro. Eliz. 269.

tion of the estate, which is broken when one dies. This differs from a lease to two persons for their lives, for that gives an estate to *both* for their lives, and both have an estate of freehold therein in their own right; which cannot determine by the death of one of them, for then the other could not be said to have an estate for his life, as the lessor at first gave it.¹ Where a lease was made for twenty-one years, if the lessee should live so long *and continue in the lessor's service*, it was held, that it did not determine on the lessor's death.² If a lease is made for a certain number of years, provided the lessee *shall so long continue to occupy the premises personally*, it will cease and determine whenever he parts with the possession, even by compulsion of law.³ If a lease be made to J S for twenty years, if the coverture between A and B shall so long continue, it is good for twenty years, *although the dissolution of the coverture* may determine it sooner.⁴ But a lease to one generally during the coverture of A and B would create but a tenancy at will, because of the uncertainty of the duration of the coverture.⁵ Where a lease for years is made to A and B, "if they should so long live;" or to A, "if he and B should so long live;" or "if the lessor and lessee, or the lessor and J S should so long live;" in any of these cases, if one dies the lease is determined.⁶ So, if a lease is made during the minority of J S, or until J S shall come to the age of twenty-one years, it is good;⁷ and if J S dies before he comes to his full age, the lease is ended; so, if a man makes a lease for twenty-one years, "if J S live so long,"⁸ or "if J S shall continue to be parson of Dale so long," they are good.⁹ If A makes a lease to B for as many years as A and B or either of them shall live, not naming any certain number of years: or if the parson of

¹ 4 Bac. Abr. tit. Leases (L) 4; Daniel v. Hill, Cro. Jac. 877; 1 Roll. Rep. 309.

² Wrenford v. Gyles, Cro. Eliz. 648; Cole Ejec. 402.

³ Lockwood v. Clarke, 8 East, 185.

⁴ Say v. Smith, Plowd. 273.

⁵ 4 Bac. Abr. tit. Leases (L) 3.

⁶ Brudnell's Case, 5 Coke, 9 b;

Daniel v. Hill, Cro. Jac. 877; 1 Roll. R. 197; Bailes v. Wenman, 2 Ventr. 74.

⁷ Bishop of Bath's Case, 6 Coke, 85; Boraston's Case, 3 Coke, 19; Whittome v. Lamb, 12 M. & W. 813.

⁸ Wright v. Cartwright, 1 Burr. 282.

⁹ 4 Bac. Abr. tit. Leases (L) 2, 3.

Dale makes a lease of his glebe for so many years as he shall be parson there : they are not certain, neither can they be made so by any means ; and yet if a parson makes a lease from three years to three years, so long as he shall be parson, it is good for six years, if he continues parson so long, and for the residue *is void for uncertainty*,¹ and the general rule is, that, if a person makes a lease for a term longer than he has power to grant, the lease will be good for such part of the term as he had power to demise.²

Leases for long terms were formerly discouraged, and leases for more than forty years, at the common law were held to be void, because they tended to disinherit men.³ But, says MR. PLATT,⁴ if such a rule ever existed it soon became obsolete,⁵ and now both in this country and in England there is no restraint or limitation upon the duration of leases by the common law ;⁶ and a lease for 99 years, or for 999 years, is of no higher character than one for two years.⁷ In New York, by a constitutional provision, agricultural leases cannot be made for a longer term than twelve years,⁸ but this does not apply to leases of city or other property, for other than agricultural purposes.⁹ If, however, under this constitutional provision

¹ Id. (L) 8.

² *Martin v. Sterling*, 1 Root (Conn.) 210. In *Law v. Hempstead*, 10 Conn. 23, the court held that where a right of way was granted 14 feet 6 inches in width for carriages, carts, &c., and 11 feet of such was covered by an outstanding mortgage, that the grantee took a right of way in the remaining 3 feet and five inches for such vehicles as the width of the way would allow to pass. See also, *Williams v. Robinson*, 16 Conn. 522, where a mortgage made to cover more land than the mortgagor owned, was held good as to that which he did own. See also, *Rogers v. Moore*, 11 id. 533 ; *Wooden v. Haviland*, 18 id. 107 ; *Chamberlain v. Thompson*, 10 id. 243. Indeed, this doctrine has been held from an early period. In *Foord's Case*, Dyer, 338 b, pl. 43, a lease made by a prebendary for 70 years, but which was confirmed by the bishop, &c., for only

fifty-one years, was held good for the fifty one years, GEFREY doubting ; but according to the report of this case in 5 Coke, 81 a, the confirmation was held good for the whole term, and in the report of the same case by Croke and by Anderson, they agree with Coke. *Tomlinson's Case*, Helt. 75.

³ Co. Lit. 45 b ; *Theobald v. Duffy*. The ordinary husbandry lease was for 21 years. *Attorney-Genl. v. Owen*, 10 Ves. 560 ; 2 Blackstone's Com. 142 ; *Risden v. Tufflin*, Toth. 187.

⁴ 1 Platt on Leases, 668.

⁵ 2 Blackstone's Com. 142.

⁶ *Brown v. Tighe*, 8 Bli. P. C. N. S. 272.

⁷ Both are mere chattels and go to the executor. *Dillingham v. Jenkins*, 15 Miss. 479.

⁸ Const. of New York, Art. 1. Sec. 14.

⁹ *Odell v. Durant*, 62 N. Y. 524.

a mere right in agricultural land is let for purposes *other than that of agriculture*, as, for mining purposes simply, in order to take the lease out of the provision of the constitution, *there must be an express restriction to such purpose in the lease,*¹ and the right to use it for agricultural purposes should be expressly excepted from the lease.²

SEC. 293. **Leases for life or lives.**—At the common law, an estate for life cannot be made to commence from a future day, as an estate of freehold cannot commence *in futuro*.³ Thus, a lease to A for life, from the 1st day of April next, &c., at the common law, would be void. But, under the later decisions, the word “from” is construed either as exclusive or inclusive, according to the circumstances and evident intent of the parties; consequently, such a lease for life “from the day of the date hereof,” is construed as conveying a present estate, and such a lease will be upheld.⁴ So, a lease to hold for the lessee’s life, which term shall begin after the determination of a previous term for their lives, is good.⁵ Under the statute of uses, an entirely different rule prevails in cases of limitations as to demise or trusts taking effect under such statute,⁶ and in most, if not in all the States, estates in freehold may lie in grant as well as in livery of seizin, and such is the condition of such estates in England under the statute 8 & 9 Vict. chap. 106, sec. 2.⁷ A lease for life, without mentioning whose life, is a lease during the life of the lessee.⁸ A lease for life to A during

¹ RAPELLO, J., in *Odell v. Durant*, ante.

² Id.

³ 2 Blackstone’s Com. 144, 315; *Shep. Touch.* 272.

⁴ *Freeman v. West*, 2 Wils. 165; *Ackland v. Luttrell*, 9 Ad. & El. 879; *Pugh v. Duke of Leeds*, Comp. 714. In the last named case, LORD MANSFIELD, after a review of all the previous cases, said: “The ground of the opinion and judgment which I now deliver is, that ‘from’ may in vulgar use, and even in the strict propriety of language, mean either *inclusive* or *exclusive*; that the parties neces-

sarily understood and used it in that sense which made their deed effectual; that courts of justice are to construe the words of parties so as to effectuate their deeds and not destroy them; more especially where the words themselves abstractedly may admit of either meaning.

⁵ *Underhay v. Underhay*, Cro. Eliz. 296.

⁶ *Gilbertson v. Richards*, 4 H. & N. 277; *Rivis v. Watson*, 5 M. & W. 255.

⁷ 1 Saunders on Uses, 142; 1 Platt on Leases, 692.

⁸ Co. Lit. 42 a.

the life of B and C, continues so long as either lives ;¹ but a lease for a term of years if A and B shall so long live, is determined by the death of either,² and the distinction upon the difference between a limitation and a condition. In the case last cited LORD COKE says: "And two differences were taken and agreed in this case. 1st. Between a limitation, as the case before, and a condition: for if a man leases land for one hundred years, 'if A and B shall so long live,' in that case, if one of them dies the lease is ended, *for the lease was conditional*, and not determinable by limitation of estate; and the life of a man is collateral as to the lease, which is but a chattel.

"The second difference was between a limitation of an estate of freehold during lives (which is the usual and ordinary limitation of freehold) and a *collateral* determination, as, during the time that C and D shall be of the Inner Temple, or during the time that C and D shall be dwelling in Norfolk, or shall be justice of the peace, and the like; for in these cases the failure of the one shall determine the estate."

SEC. 294. *Reddendum*.—The *reddendum* fixes the amount and kind of compensation to be paid by the lessee to the lessor for the use and possession of the premises demised, and usually specifies the period at which such recompense is to be paid or rendered.

No special form of words is essential. A proviso,³ or a covenant,⁴ may constitute a good reservation of rent, and a letting "*at and under the rent of*" any sum named, is an agreement by the tenant to pay that rent.⁵ Under the words *yielding and paying*, a covenant for payment of the rent is implied.⁶

¹ Pritchard v. Dodd, 5 B. & Ad. 698.

² Brudnell's Case, 5 Coke, 9.

³ Harrington v. Wise, Cro. Eliz. 486.

⁴ Drake v. Munday, Cro. Car. 207.

⁵ Doe v. Kneller, 4 C. & P. 8.

⁶ Iggulden v. May, 9 Ves. 880; Hellier v. Casbard, 1 Sid. 266; Porter v. Swetnam, Styles, 406. In Kemble Coal and Iron Co. v.

Scott, 90 Penn. St. 332, the plaintiffs agreed to "grant, let, and lease," for the term of eleven years, "the exclusive right to mine, dig, and take away the iron ore from four tracts of land; also the right to make tramroads, erect machinery, open tunnels, deposit dirt, and do all things necessary and appertaining to the mining of said ore." In consideration

SEC. 295. *Rent payable in advance.*—Rent may be made payable in advance, but in that case the reddendum should state expressly that the rent is so payable *from time to time*, or *always*, in advance, or the stipulation for payment in advance may be held to relate to the first quarter's rent only.¹

SEC. 296. *Certainty as to amount of rent.*—*The amount of the rent must be either expressly stated, or otherwise rendered capable of being ascertained with certainty.*² In some cases there may be a certainty in uncertainty; as a man may hold the premises of his landlord to shear all the sheep depasturing upon the premises; and this is certain enough, although the landlord has sometimes a great and sometimes a small number there.³ A royalty of so much quarterly per yard for marl got, and so much per thousand for all bricks made, or so much per square for slate quarried, or so much per bushel for each bushel of

therefor, defendants, an iron company, bound themselves and their successors to pay to plaintiffs, their heirs or assigns, on the fifteenth day of each month, fifty cents per ton for every ton of ore mined and taken away the month previous. It was further provided, that for the first year, defendants should pay rent on as many tons as they might be able to mine, but, for any period of three years thereafter, the rent in the aggregate was not to be less than \$10,000, whether ore to that extent or amount was mined or not. The agreement was under seal, and duly acknowledged and recorded. At the end of four years, plaintiffs brought an action to recover the \$10,000, for the last three years under the covenant in the agreement. It was held that the agreement was not an executory, but an executed contract; that it was not an agreement for a lease or a license, but a present lease, and that this was not such a case as would justify the court in granting relief on equitable grounds. The covenant in the lease was express that, for any period of three years after the first year, the rent

in the aggregate was not to be less than \$10,000, and it was held that there was not a word therein to support the idea that this was a mere stipulation, which might be avoided by abandonment or surrender of the contract by the lessees, or that the amount was not payable until the expiration of the entire term; and that if defendant ceased operations in 1873, and no royalty was demanded or paid before 1876, it was not, therefore, to be presumed that the contract was ended by the mutual consent of the parties. In the negotiation immediately preceding the agreement, the vice-president of defendant company, who conducted the negotiation, had written to plaintiffs that, if the lease could be effected, defendant would take the risk of plaintiffs' establishing their title to one of the tracts. This was held to be proper to leave to the jury, and for them to find "that the defendant took the tract with knowledge of the title and at their own risk."

¹ See *Holland v. Palser*, 2 Stark. 161.

² Co. Lit. 142 a.

³ Co. Lit. 96 a.

grain raised by the tenant, is a rent capable of being ascertained with certainty.¹

The rent must be reserved to the lessor and his heirs, and not to a stranger.² But the law uses all ingenuity imaginable to conform the reservation to the estate.³ Hence a reservation to the lessor, entitled in fee, his heirs, *executors*, and assigns, will not prevent the rent from following the reversion and going to the heir.⁴

SEC. 297. *Mode of reservation.*—The most clear and sure mode of reservation is to reserve rent yearly during the term, and leave the law to make the distribution, without an express reservation to any person.⁵ A reservation of rent to the lessor only, not mentioning his heirs, &c., will enure only during the life of the lessor,⁶ unless the reservation be expressly to the lessor *during the term*, in which case rent will continue payable to the end of the term.⁷

SEC. 298. "*Net rent.*"—A stipulation for a *net rent* means a rent clear of all deductions; hence the tenant under a lease containing this reservation will be liable to pay land tax and water rates, and all rates chargeable upon the premises.⁸

¹ Daniel v. Gracie, 6 Q. B. 145; 18 L. J. Q. B. 309. See judgment in Watson v. Waud, 8 Ex., at p. 389.

² Lit. s. 846; 2 Wms. Saund. 370. See *post* Rent.

³ Sacheverell v. Froggatt, 1 Vent. 161.

⁴ Drake v. Munday, Cro. Car. 207. See Sacheverell v. Froggatt, 2 Wms. Saund. 367 a.

⁵ Whitlock's Case, 8 Co. R., at p. 71.

⁶ Co. Lit. 47 a.

⁷ Sacheverell v. Froggatt, 2 Wms. Saund. 367 a.

⁸ Bennett v. Womack, 7 B. & C. 629; 2 C. & P. 96; Bradbury v. Wright, 2 Dougl. 624.

CHAPTER XXIX.

CONSTRUCTION OF LEASES.

SEC. 299. General rules for.

SEC. 300. Oral evidence admissible when to explain, &c.

SEC. 299. General rules for.—Leases, whether by deed or otherwise, are to be construed, like all other contracts, so as to effectuate the intention of the parties. The rules for ascertaining which, as well as the general rules for construction, are so fully given in the succeeding chapter on Covenants as to render their repetition here unnecessary. It may be stated as a general rule, that if a lease or deed may operate two ways, the one of which is consistent with, and the other repugnant to, the intention of the parties, that construction will be adopted which will give effect to the intention of the parties, if by law it may so operate, but if it cannot operate in one way it will be made to operate in another if possible.¹ If a material word is omitted and the other words in the lease cannot have their proper effect unless it is supplied, the court will, when the imperfect expression can be resolved by reference to the context of the lease when brought into contact with the surrounding circumstances, aid the imperfect expression in favor of the manifest intention of the parties, and will read the instrument as though the word was inserted in the instru-

¹ Goodtitle v. Bailey, Camp. 600; Solly v. Forbes, 4 Moore, 448; Hotham v. East India Co., 1 T. R. 638. A leased to B a foundry building, yard, the joint use of a pattern shop and an engine room for \$500 per year. In a subsequent clause of the lease it was provided that B should pay fifteen cents per hour for steam furnished to his en-

gine by A, A to have the use of the power of the engine without charge. A failed to furnish steam to B. In an action of covenant by B against A for this alleged breach, it was held that there was no covenant by A to furnish steam nor by B to use it. Penn. Iron Co., Limited, v. Dieler, 113 Penn. St. 635.

ment, and that, although the particular passage where it ought to stand conveys a sufficiently distinct meaning without it.¹ If a wrong word, descriptive of the estate, is used, and in applying the description to the estate the error is obvious, the right word will be supplied. And under this rule, the word "east" in a lease, for boundary in a grant will be construed to mean "west" where such correction is obviously required by the other calls in the instrument.² So, where a lease in writing is made, and certain words have been stricken out, which, if left, would have entirely changed the meaning of the lease or the character of the estate granted, yet, if the omission of such words leaves the matter in doubt as to what the parties really mean, or as to the character of the estate which was intended to be conveyed, resort may be had to the words erased, to ascertain their intention. Thus, in one case³ a lease was produced in evidence by which the plaintiff agreed to let the premises for the term of one year fully to be completed and ended. Most of the subsequent stipulations in the lease were inapplicable to a tenancy determinable by a notice to quit. The lease on the face of it originally contained words showing a tenancy from year to year, *which were struck out*, and the words as to the term were left as stated above. It was held, that the words that had been struck out might be looked at to show what the intention of the parties was, and that the parties intended a tenancy for only one year, and that all words inconsistent with such a tenancy must be treated as expunged.

When necessary to do so, the courts will draw all such plain and reasonable inference, from the language and

¹ Wright v. Dickson, 1 Dowl. 141; Jarvis v. Wilkins, 7 M. & W. 410; Coles v. Home, 8 B. & C. 568; Langdon v. Goole, 3 Lev. 21; Say's Case, 10 Mod. 46. So the court will reject inconsistent words. Thrall v. Newell, 19 Vt. 202. In a case where a note read, "I promise not to pay, &c.," the court rejected the word *not*. Thrall v. Newell, ante. And where a bill of exchange was made

for "twenty-five, seventeen shillings," the court supplied the word pounds. Phipps v. Tanner, 5 C. & P. 488. And where a person agreed to pay a tailor a certain sum "for a suit of, ordered for, &c.," the word *clothes* was supplied. Jarvis v. Wilkins, ante.

² Mizell v. Simmons, 79 N. C. 182.

³ Strickland v. Maxwell, 2 C. & M. 539.

general context of the instrument as appear to be necessary to give effect to the obvious meaning of the parties. Thus, in a case where the lease recited an agreement made by the lessee with other part owners to pull down a certain smelting mill upon the premises and build another of larger dimensions, and the lease contained an express covenant to keep such new mill in repair, the court held that a covenant *to build* the mill might be implied from the import of the whole deed, and that the lessor might maintain an action of covenant for the lessee's failure to do so, and recover his proportion of the damages for such failure.¹ Care should always be taken to describe the premises with reasonable certainty, but too much particularity of description may be worse than too little, and if the description is so vague and indefinite that it cannot be applied to the subject-matter, and there is no reference in the grant to any other conveyance or anything that will aid the application of the grant by construction or otherwise, it will be void; but if by any rules of construction the grant can be applied to the subject-matter, it will be upheld, notwithstanding the description is vague and uncertain, and, if necessary, the court will reject or reconcile necessary particulars.²

¹ *Sampson v. Easterly*, 9 B. & C. 505; *Saltarm v. Houston*, 1 Bing. 433. In January, 1883, the owner of a lot of woodland executed a lease of it for two years, from April 1, 1883, the lessee to have the privilege of cutting and removing the wood and timber during that time, and agreeing to pay a certain sum on May 1, 1883, with interest from the day of the execution of the lease. The lease also contained an agreement "that the wood and timber on the described premises shall be held by the lessor as guaranty for the payment" of the sum named and interest. At the same time the lessee gave the plaintiff a promissory note for the amount named, with interest, payable on May 1, 1883. When the note became due it was not paid, and the parties agreed that it might lie on interest. The lessor afterwards permitted the lessee to cut and remove some of the wood and tim-

ber. It was held that the transaction was not a conditional sale, but was in the nature of a pledge. It was held also that after the failure of the lessee, the lessor could acquire no conditional title, as against an assignee in insolvency subsequently appointed, by taking possession of the wood and timber, with the consent of the lessee. *Wilkie v. Day*, 141 Mass. 68.

² *Hall v. Foster*, 7 Vt. 100; *Wing v. Burgis*, 12 Me. 111; *Wright v. Cochran*, 8 Iowa, 507; *Bailey v. White*, 41 N. H. 337; *Harvey v. Mitchell*, 81 id. 575; *Jackson v. Marsh*, 6 Cow. (N. Y.) 281; *Armstrong v. Mudd*, 10 B. Mon. (Ky.) 144; *Kea v. Robeson*, 5 Ired. (N. C.) Eq. 375; *United States v. King*, 8 How. (U. S.) 773. If necessary, a general description will govern a particular one. *Sawyer v. Kendall*, 10 Cush. (Mass.) 241; *Worthington v. Hyler*, 4 Mass. 196. "Seventy acres lying and being

Where the description includes several particulars, all of which are necessary to ascertain the estate, no estate will pass except such as will agree with every particular;¹ but if the description is sufficiently certain to ascertain the estate conveyed, the estate will pass although it does not agree with some of the particulars.² The rule may be said to be, that descriptions in a grant are to be construed liberally, so as to carry into effect the intent of the parties if possible, and it is only necessary that after subjecting it to every modification which the actual condition of the premises may require, there shall be left some substantial designation of the thing to be conveyed, so that the court, looking at the property in the condition in which it was when the grant was made, that the description can be fitted to it, and was intended to relate to it.³

It may be stated as a general rule that, where from the whole instrument it appears to have been the intention of the party to bind himself by any agreement, a covenant to do the thing in question may be collected from the whole of the lease taken together, or from any form of expression in any part of it,⁴ and the courts have gone to great lengths in extracting covenants from the various parts of a deed, where, possibly, the parties never in fact intended to covenant, as from recitals in the deed, &c.⁵

SEC. 300. Oral evidence admissible when to explain, &c.

—The general rule is too well established to need repetition, that parol evidence is not admissible to explain, add to, or vary the meaning of express terms employed in a deed or other written instrument,⁶ but like most gen-

in the south-west corner of a section," is a good description, and the land will lie in a square. *Walsh v. Ringer*, 2 Ohio, 327.

¹ *Jackson v. Clark*, 7 John. (N. Y.) 217; *Worthington v. Hyler*, 4 Mass. 196.

² *Worthington v. Hyler*, ante.

³ *Peck v. Mallams*, 10 N. Y. 509.

⁴ *Duke of St. Albans v. Ellis*, 16 East, 352; *Deering v. Farrington*, 1 Mod. 113; *Seldon v. Senate*, 18 East, 63; *Russell v. Gulwel*,

Cro. Eliz. 657; *Brice v. Carre*, 1 Lev. 47; *Pordage v. Cook*, 1 Saund. 319.

⁵ *Barfoot v. Freswell*, 3 Keb. 465; *Severn v. Clark*, 2 Leon, 122; *Graves v. White*, 1 Eq. Cas. Abr. 84; *Hollis v. Carr*, 2 Mod. 87.

⁶ All previous conversations, contracts or agreements relating to the subject-matter are merged in the written contract, and it cannot be added to or subtracted from by proof of a *different* agreement or

eral rules, it is subject to numerous exceptions. It is not competent to show by parol that certain other premises were intended to be included in the lease; or that certain premises named therein were intended to have been excluded;¹ or to show that more or less rent was agreed upon; or that it was to be apportioned;² or that it was

of any agreement in any wise affecting it. *Smith v. Higbee*, 12 Vt. 113; *Cole v. Spann*, 13 Ala. 587; *Albert v. Zeigler*, 29 Penn. St. 60; *Pilmer v. Bank*, 16 Iowa, 321; *Bradley v. Bentley*, 8 Vt. 248; *West v. Kelly*, 19 Ala. 359; *Walker v. Engler*, 30 Mo. 130; *Vaughn v. Lynn*, 9 Mo. 870; *Norton v. Woodruff*, 2 N. Y. 158; *Hoffman v. Hammer*, 14 N. J. L. 269; *Hair v. La Brouse*, 10 Ala. 548; *Lockett v. Tobey*, 10 La. An. 713; *Faukboner v. Faukboner*, 20 Ind. 62; *Dean v. Mason*, 4 Conn. 428; *Brandon Mfg. Co. v. Morse*, 48 Vt. 323; *Walters v. Vanderveer*, 17 Kan. 425; *Dixon v. Clayville*, 44 Md. 573; *Slocum v. Smith*, 2 Low. (U. S. D. C.) 212; *McMillen v. Parkell*, 64 Mo. 286; *Church v. Town*, 49 Vt. 29. The fact that a lease is in the hands of a third person will not authorize parol evidence as to its contents, unless the person has first been subpoenaed to produce it. *Rucker v. McNally*, 5 Blackf. (Ind.) 123. Nor will the fact that he is out of the State, and has been notified to produce it, change the rule. *McGregor v. Montgomery*, 4 Penn. St. 287. Where the lease contains no warranty, express or implied, that the premises are fit for occupation, it is not competent to show that the landlord represented them to be so. *Dutton v. Gerrish*, 9 Cush. (Mass.) 89. Where an assignment of a lease is made in writing, it is not competent to show that the assignee agreed to pay the accrued rent. *Graves v. Porter*, 11 Barb. (N. Y.) 192. Where a lease abrogates a previous written agreement, it is not competent to show that it was not intended to have that effect. *Tibbetts v. Percy*, 24 Barb. (N. Y.) 39. Under a lease of coal mines, containing no stipulation as to the quantity of coal to be mined, but fixing a certain sum per bushel as the rent to be paid, parol evidence is not admissible to show that the lessee agreed to

mine any particular quantity, or even all that he could. *Lyon v. Miller*, 24 Penn. St. 892. When a party seeks to enforce a written contract, although the defendant cannot introduce parol evidence to alter or vary it, yet, if the plaintiff introduces evidence as to a contract not embraced in the writing, the defendant is at liberty to introduce evidence of a different contract for the purpose of contradicting the plaintiff's evidence although it has the effect to vary the terms of the written contract. *Arbeiter v. Day*, 88 Conn. 155. Where there is no latent ambiguity, parol evidence is not admissible. Thus, where lands leased were bounded on the north line of a town, parol evidence was held inadmissible to show that a different line had been understood by the parties to be the true boundary. So where a lease was in writing, and there were only two exceptions therein, it was held that it could not be shown by parol that the lessor intended to make still another. *Haney v. Newton*, 7 Pick. (Mass.) 29, and generally it may be said, that parol evidence is not admissible to prove an agreement that directly contradicts the lease. *Jungerman v. Bovee*, 19 Cal. 354; *Carpenter v. Shanklin*, 7 Blackf. (Ind.) 308, or that it was intended to have a different effect from that which it purports to have. As, that it was intended as a mortgage, *Stewart v. Murray*, 13 Minn. 426, or that it was understood that the lessee might occupy the premises for any purpose, when the use was specially restricted in the lease. *Sientes v. Odier*, 17 La. An. 153.

¹ *Barton v. Dawes*, 10 C. B. 261; *Meres v. Ansell*, 3 Wils. 275; *Norton v. Webster*, 12 Ad. & El. 442; *Hope v. Atkins*, 1 Price, 148.

² *Flinn v. Calow*, 1 M. & G. 589; *Preston v. Merceau*, 2 W. Bl. 1249. But if no rent is named in the

to be paid at a different time from that named in the lease ;¹ or that the lease was to commence at a later date ;² or that the tenant was to pay the taxes, &c. ;³ or that other rights and privileges than those named in the lease were given ;⁴ or that the landlord agreed to repair the premises ;⁵ or, indeed, where the lease is explicit, is parol evidence even admissible to aid in its construction.⁶ But as previously stated, there are exceptions to the rule, and in addition to those exceptions it may be said that parol evidence is always admissible to defeat the lease, as, to show that it was made for an illegal purpose,⁷ or that certain

lease, parol evidence is admissible to show what rent was agreed upon. *King v. Woodruff*, 23 Conn. 56.

¹ Thus, in *Carpenter v. Shanklin*, 7 Blackf. (Ind.) 308, by lease of real estate executed by the lessor and lessee, under their seals, for one year, the time fixed for the payment of the last half year's rent was February 1, 1841. It was held, that parol evidence that the said rent was not due until March 1, 1841, was inadmissible; also, that the landlord, in such case, had a preference for said rent over an execution levied February 1, 1841, on the tenant's goods.

² *Henson v. Cooper*, 3 Scott's N. R. 48.

³ *Rich v. Jackson*, 4 Br. P. C. C. 514, cited and reported in full in note c, 6 Ves. 334.

⁴ *Jungerman v. Bovee*, 19 Cal. 354; *Sientes v. Odier*, 17 La. An. 153. But where the lease provides that he shall hold the lease subject to "manor regulations," or "municipal regulations," &c., the lessee may show by parol what such regulations are. *Dorsey v. Eagle*, 7 G. & J. (Md.) 321. Where certain specific exceptions are made in a lease, it cannot be shown by parol that other exceptions were agreed upon. *Hovey v. Newton*, 7 Pick. (Mass.) 29.

⁵ *Mayer v. Muller*, 1 Hilt. (N. Y. C. P.) 491; *Post v. Vetter*, 2 E. D. S. (N. Y. C. P.) 248; *New York v. Price*, 5 Sandf. (N. Y. Supr. Ct.) 542. In *Howard v. Thomas*, 12 Ohio St. 201, the plaintiff and defendant executed a written agreement for the lease of a house for

the term of one year, at the rent of \$100. In an action by the plaintiff against the defendant for not repairing the roof of the house, the plaintiff offered to prove, by parol, that, at the time of the execution of the written agreement, he refused to sign it, unless the defendant would promise to repair the roof of the house; and thereupon the defendant promised to do so, and he, the plaintiff, in consideration of such promise, signed the written agreement. It was held, that such evidence was inadmissible.

⁶ 2 Best on Evidence (Wood's Edn.) note, page 588.

⁷ *Doe v. Allen*, 8 T. R. 148; *Rex v. Northwingsfield*, 1 B. & Ad. 912; *Lightfoot v. Tenant*, 1 B. & P. 555. Where fraud or illegality are averred, parol evidence is always admissible to establish it, whatever may be its effect upon the contract. Thus, it may be shown that a material part of the contract has been inserted or altered by the fraud of the other party. *Baltimore Steamboat Co. v. Brown*, 54 Penn. St. 77; *Pierce v. Wilson*, 34 Ala. 596; *Townsend v. Cowler*, 31 id. 428; *Hunter v. Biglyon*, 30 Ill. 228; *Hamilton v. Congers*, 28 Ga. 276; *Sanford v. Handy*, 23 Wend. (N. Y.) 126; *Akin v. Drummond*, 2 La. An. 92; *Gatting v. Newell*, 9 Ind. 572; *Davis v. Stern*, 15 La. An. 177; *Bartle v. Vosburg*, 2 Grant's Cas. (Penn.) 277; *Selden v. Myers*, 20 How. (U. S.) 506; or that the other party by fraud has prevented the reduction of the whole contract to writing. *Phyfe v. Wardwell*, 2

formalities required by law were not observed;¹ or, indeed, fraud or anything that tends to show that the deed is void in law may be shown.² So, too, it is competent to show by parol evidence to what premises the lease applies, when, although the lease upon its face is clearly enough expressed, yet an ambiguity arises from extrinsic circumstances. Where there is any ambiguity in a lease, and it cannot, from the language used, be ascertained what was intended by the use of a certain word or phrase, the sense which it has acquired by usage, if any, in the locality where the premises are situated, may be shown, and it will be presumed that it was used in such sense.³ In the case last cited the lessee of farming land covenanted that the "stubble" should belong to the landlord. In an action by the landlord's assignee to recover damages for having been prevented from grazing his sheep on the land, *held*, that evidence was admissible to prove that by the custom of the locality of the leased premises the word "stubble" included whatever was left upon the ground after harvest. The court said: "It was the duty of the court to construe the contract in such a way as to render it operative and effectual to carry out the purpose of the parties as expressed in the language and terms which they used. As a general rule, the words of a contract are to be understood in their ordinary and popular sense rather than according to their strict legal meaning; but if they are used in a technical sense they should be interpreted as usually understood by persons in the profession or business to which they relate;

Edw. Ch. (N. Y.) 47; Elliott v. Conwell, 18 Miss. 91; Wesley v. Thomas, 6 H. & J. (Md.) 54; Kennedy v. Kennedy, 2 Ala. 571; Chetwood v. Britain, 2 N. J. Eq. 438; Sull v. Cass, 43 N. H. 62; Martin-eau v. May, 18 Wis. 54. As to proof of illegality, see Lazare v. Jacques, 15 La. An. 599; Corbin v. Sistrunk, 19 Ala. 203.

¹ Kelfe v. Ambrose, 7 T. R. 551.

² Goodwin v. Hubbard, 15 Mass. 219; Boyer v. Grundy, 3 Pet. (U. S.) 219; Russell v. Rogers, 15 Wend. (N. Y.) 851; Prentiss v. Russ, 16 Me. 30; Wren v. Woodlaw, 1 Ala.

863. Where fraud is alleged, any consideration of fact, however contrary to the averment of a deed, may be proved to show the fraudulent nature of the transaction, Roscoe's Ev. (18th ed.) 22; Paxton v. Popham, 9 East, 421, for fraud is an extrinsic and collateral matter that avoids all transactions, and the same is true as to illegality. Chandler v. Ford, 3 Ad. & El. 649; Collins v. Blantern, 2 Smith's S. C., notes.

³ Callahan v. Stanley, 7 Pac. L. J. 672, Cal.

or, if they have a special meaning given to them by usage, the meaning should be followed. In such a case evidence explanatory of the words is admissible, not for the purpose of adding to or qualifying or contradicting the contract, but for the purpose of ascertaining it by expounding the language, and so enabling the court to interpret it according to the actual intention of the parties, and the law and usage of the place where it is to be performed. If there was an existing usage among farmers as to the meaning of the word 'stubble' when this contract was made, it must be inferred that the contracting parties, being farmers, contracted with reference to it, and that they used the word in the broader meaning which was given to it by that usage, and not in the ordinary or popular sense. Evidence of such usage and meaning was therefore admissible to define and explain the peculiar or local meaning of the word as it was used in the contract."¹ Thus where the lease is of "The Lanier House;" or it is competent to show what premises are connected and used with it, and what extent of building and grounds are included under the expression, and testimony as to what was ordinarily meant in that locality by the words is admissible;² or what premises are understood to be embraced in the words "my home farm," or any other *general* description of premises.³ Thus, a

¹ See *Randall v. Smith*, 68 Me. 105; 18 Am. Rep. 200, *Jones v. Hoey*, 22 Alb. L. J. 297.

² *Harris v. Dub.* 57 Ga. 77; *Sargent v. Adams*, 3 Gray (Mass.) 72.

³ *Hutchins v. Scott*, 2 M. & W. 816; *Hutchins v. Groom*, 5 C. B. 515. Where there was an agreement in writing to lease for a term of years "The Adams House, situate on Washington Street, Boston," it was held that it might be proved by parol to have been intended by the parties to include only so much of the building as was fitted up as a hotel, by the name of the Adams House, and not the separate shops which occupied the whole of the ground floor, except the entrance to the hotel. *Sargent v. Adams*, 3 Gray (Mass.) 72. Whether certain premises are or are not embraced in the lease,

when the lease does not explicitly describe them, is always open to parol proof. *Crawford v. Morris*, 5 Gratt. (Va.) 90; *Guy v. Barnes*, 29 Ind. 103; *Corbett v. Costello*, 8 La. An. 427; *D'Aquin v. Harbour*, 4 id. 441. In *Chamberlain v. Letson*, 5 N. J. L. 152, the lease demised a "house and lot containing three acres, more or less." The lessee claimed *seven* acres, the whole being in one lot not separated by a fence. Parol evidence was admitted to show that the original lot connected with the house was about three acres; that the lessor added about four acres by purchase, and occupied the whole at the time of the demise, and that the lease was intended by the parties to cover only the original three acres, visible remains of the old original line being still visi-

building misdescribed as number 38, may be shown in fact to mean number 35 ;¹ especially would this be so, if it was shown, that the lessor owned number 35, and did not own number 38, and the tenant had gone into possession of 35 under the lease. But if the landlord owned both, and there was nothing in the lease to indicate that 35 instead of 38 was intended, and the tenant had not gone into possession under the lease, it would not be competent in a court of law to show that 35 was intended. Where a grant is in general terms, the addition of particular terms operate as a restriction and limitation upon the grant. Thus, if a lease is of "the premises on the corner of College and Centre Street," the whole of the premises there situated, owned by the lessor, will pass ; but if, in addition thereto, the words "recently occupied by E. Laporte, as a French Hotel" are added, the latter clause limits the grant to such part of the premises as were occupied by E. Laporte for a French Hotel, and no more, and no less will pass. Therefore, the extent of the grant being rendered uncertain by such restrictive clause, parol evidence is admissible to show what part of the premises was occupied by E. Laporte for a French Hotel, and thus, to define the extent of the demise."

ble. A call in a grant for a line beginning at the "north corner of R's store," where the store stands squarely east and west and has two north corners, is a latent ambiguity, and may be explained by parol proof. *Lawrence v. Hyman*, 79 N. C. 209.

¹ *Hutchins v. Scott*, ante. And even though such a lease was void to create any interest, if the tenant went into possession of the premises intended, it would be admissible to prove the terms of the tenancy. *Bealand v. Hurst*, 8 Starkie, 60.

² *Alger v. Kennedy*, 49 Vt. 109 ; 24 Am. Rep. 117. See also. *Nutting v. Herbert*, 85 N. H. 125. In *Conolly v. Vernon*, 5 East, 51, the rule was thus stated : "Where there is a grant of a particular thing once sufficiently ascertained by some circumstance belonging to it, the addition of an allegation, mistaken or false, respecting it,

will not frustrate the grant ; but where a grant is in general terms, there the addition of a particular circumstance will operate by way of restriction and modification of such grant. Therefore, where one having customary tenements, compounded and uncompounded, surrendered to the use of his will 'all and singular the lands, tenements, &c., whatsoever, in the manor, which he held of the lord by copy of court-roll, in whose tenure or occupation soever the same were, being of the yearly rent to the lord in the whole of 4l. 10s. 8½d., and compounded for : ' held, that the words 'and compounded for,' restrained the operation of the surrender to that description of copyholds then belonging to the surrenderor. And that the words 'being of the yearly rent, &c., of 4l. 10s. 8½d.,' which were not referable to any actual amount of his rents, either compounded or un-

But, if the description of the premises of itself affords ample means of ascertaining or defining the premises intended to pass, it is not competent to show by parol that the lease was intended to apply to other premises, even though there are errors or inconsistencies,¹ and the actual intention of the parties is in opposition to the strict letter of the lease.²

Where the language of a lease is illegible from age or other causes, and the construction is doubtful from antiquity, parol evidence is admissible to show what its provisions are, as well as to aid in its construction in any doubtful matter.³ So parol evidence is admissible to ex-

compounded, though much nearer to the whole than to the compounded only, could not qualify or impugn that restriction." See also, to the same effect; *Bell v. Sawyer*, 32 N. H. 72; *Tenny v. Beard*, 5 id. 58; *Hibbard v. Hurlburt*, 10 Vt. 178; *Sargent v. Adams*, 8 Gray (Mass.) 72; *Mitchell v. Stevens*, 1 Aik. (Vt.) 161; *Putnam v. Smith*, 4 Vt. 622. In *Freeland v. Burt*, 1 T. R. 701, the demise was of certain premises in Westminster "late in the occupation of A," particularly describing them, was held to extend only to such part of the premises as A occupied, and a cellar under yard belonging to the premises, which was in the possession of another tenant, was held not embraced in the grant; and in ejectment for the premises, it was held that the landlord might show what part of the premises A occupied, and that the cellar did not pass under the grant. In *Jackson v. Perrine*, 35 N. J. L. 137, the court laid down the rule that where the language of the grant admits of but one construction, and the location of the premises intended to be conveyed is already ascertained by a description in the deed, either by courses and distances or monuments, no other exposition derived either from the language or acts of the parties is admissible; but, *where the language is equivocal, and the location of the premises is made doubtful, either by the insufficiency of the description or the inconsistency of two or more parts of the*

description, the construction put upon the grant by the parties in locating the premises may be resorted to. See also, *McLaughlin v. Bishop*, 35 id. 512; *Thomson v. Wilcox*, 7 Lans. (N. Y.) 376.

¹ *Vose v. Bradstreet*, 27 Me. 156; *Norwood v. Byrd*, 1 Rich. (S. C.) 185; *Phillips v. Castley*, 40 Ala. 486; *Todd v. Philhamer*, 24 N. J. L. 7961; *McLaughlin v. Bishop*, 35 N. J. L. 512; *Eggleston v. Bradford*, 10 Ohio, 312; *Campbell v. Johnson*, 44 Mo. 247; *Bratton v. Clamson*, 8 Strobb. (S. C.) 185.

² *Tracy v. Albany Ex. Co.*, 7 N. Y. 474.

³ *Best on Evidence*, 198, n. a. A and B made and executed the following agreement: A doth lease unto B, her heirs and assigns, (here follows the description of the land) for the term of five years from the first day of December next, for the yearly rent of three dollars, which yearly rent the said B doth for herself, her heirs and assigns, covenant and agree to pay to the said A, his heirs and assigns, the said rent." It was held (a) that the agreement is not ambiguous, nor its meaning doubtful. (b) That the grant being to B and heirs for a term of years, reserving rent, it is a lease for the term. Where an instrument in writing is ambiguous, the intention of the parties to it is to be ascertained from the entire instrument, not from particular words or phrases without reference to the context. The instrument must operate according to the intention of the parties unless it be contrary to law. Where

plain a latent ambiguity in a deed or lease. It is a rule of construction that in order to arrive at the real intention of the parties, and to make a correct application of the words and language of the contract to the subject matter thereof, and the objects professed to be described, all the surrounding facts and circumstances may be taken into consideration. "The law does not deny to the reader the same light and information that the writer enjoyed; he may acquaint himself with the persons and circumstances that are the subjects of the allusions and statements in the written agreement, and is entitled to place himself in the same situation as the party who made the contract, to view the circumstances as he viewed them, and so judge of the meaning of the words and of the correct application of the language to the things described."⁴ A lease had been made by the plaintiff to the defendant, of part of a messuage, together with a piece of ground thereunto adjoining. This space of ground was used as a yard, and beneath the surface thereof was a cellar, occupied by a third party under a lease previously granted to him by the plaintiff. The occupant of the cellar continued to reside in it, and to pay the rent to the plaintiff for three or four years after the latter had demised the yard to the defendant, but his lease having expired, and he having quitted the cellar, the defendant took possession of it, contending that the cellar had passed to him by the demise of the yard, upon the maxim of the common law, "*cujus est solum ejus est usque ad cælum et ad inferos*," and that the plaintiff was estopped from introducing parol evidence to control or qualify the operation of the lease; but the court held that parol evidence of the surrounding circumstances might properly be brought in aid of the construction and interpretation of the lease. "The only question," observes ASHURST, J., "is whether the court are absolutely bound by the terms of this lease to put the construction upon it for which the defendant contends. *Prima facie*,

the meaning is doubtful, the circumstances at the making of the instrument, and the subsequent acts of the parties are to be considered in determining the sense of

the words. *Benidge v. Glassey*, 112 Penn. St. 443.

⁴ *Shore v. Wilson*, 9 Cl. & Fin. 555, 569.

indeed, the property in the cellar would pass by the demise, but that might be regulated and explained by circumstances, and it seems to me that the construction of all deeds must be made with reference to their subject-matter, and it may be necessary to put a different construction upon leases made in populous cities from that on those made in the country; we know that in London different persons have several freeholds over the same spot and that different parts of the same house are let out to different people.”¹

From the admission of such evidence, and from bringing the words of the written instrument into contact with surrounding circumstances, a doubt sometimes arises as to the correct application of the language and words used to the subject-matter of the contract and the objects professed to be described; this is called a *latent ambiguity*, because it is not apparent upon the face of the contract, but arises from the application of the words to the object to which they refer. “As this difficulty or ambiguity is introduced solely by the admission of extrinsic evidence of surrounding circumstances, it may be rebutted and removed by the production of further evidence of the identity of the objects described, in accordance with the ancient maxim, *ambiguitas verborum latens, verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur.*”² This may be illustrated and exemplified by a case analogous to the one mentioned by Pothier. “You rent of me an apartment in a house, the remainder of which is occupied by myself. I make you a new lease in these terms: ‘I agree to let, and A B agrees to occupy my house in Frederick Street, for the term of two years from the date hereof, at the annual rent of 20*l.*’” Any one on reading this agreement would imagine that the whole house was intended to be demised, but when evidence of extrinsic circumstances is admitted, for the purpose of applying the language of the contract to the sub-

¹ *Freeland v. Burt*, 1 T. R. 708; *Press v. Parker*, 10 Moore, 158; *Wigram*, 89, 58 (2d ed.); 20 Law J. Q. B. 67. ² *TINDAL, C. J., Miller v. Travers*, 1 M. & Sc. 845; *Bac. Max.* 23.

ject-matter thereof, a doubt at once arises, whether it was intended that you should have the whole house or the mere apartment which you had previously occupied; and this doubt, which is suggested purely by extrinsic evidence of the relative situations and circumstances of the parties at the time of the making of the contract, may be removed by parol evidence of other circumstances calculated to explain the sense in which the words were used, and to give them a correct application. The written instrument may also, on the face of it, be perfectly intelligible, and free from all doubt and obscurity, but from some of the circumstances admitted in proof, an ambiguity arises, as to which of two or more things, or which of two or more persons, each answering the words of the writing, the parties intended to designate. There may, for example, be two estates, or two persons of the same name and description, and the words may equally apply to either. This doubt or difficulty, which has been created by parol evidence, may be removed by further evidence of a like character, calculated to explain which of the estates or persons is embraced by the description in the written instrument.¹ But

¹ *Gord v. Needs*, 2 M. & W. 140; *Hiscocks v. Hiscocks*, 5 M. & W. 368; *Wigram*, p. 86, 88. See *Hammond v. Ridgely*, 5 H. & J. (Md.) 255; *Lowell v. Parkhurst*, 4 Wend. (N. Y.) 369. In *Crawford v. Morris*, 5 Gratt. (Va.) 90, where there was a written agreement to renew a lease, it was held that parol evidence was admissible to show that the cellar of an adjoining tenement had been occupied with the premises to which the lease applied, and was necessary for the prosecution of the tenant's business, for the purpose of showing that it was included in the lease to be renewed. In *Midlothian & Co. v. Finney*, 19 Gratt. (Va.) 304, the lessor, about six months after giving a lease of certain coal mines for a term, endorsed upon the lease a lease of adjoining coal lands for the residue of the term, declaring it to be a part of the original lease, and after such an endorsement, and before the term expired, he agreed to renew the lease. Parol evidence was held

admissible to show whether or not the lands of the endorsed lease were intended to be embraced in the renewal. In *Wing v. Gray*, 36 Vt. 261, there was a clause in the lease as follows: 'The lessee "is to have all the personal property on the farm," and it was held that parol evidence was admissible to show whether it was meant that he should have the use of the property, or that it should be his absolutely. In a New York case the defendant C, having a lease of a store, underlet to A the whole of the first floor excepting a portion thereof which was then partitioned off, and which consisted of the stairway, with a hatchway in front, leading to the upper stories of the building. There were two doors in the front, the one opening opposite the stairway and the other into the lower room, into which there was also access through a door in the partition. The undertenant A, with the consent of his lessor, removed the partition, agreeing to restore it

the evidence, when introduced, must have the effect of

when requested so to do. Afterwards, A sold out to the plaintiff S, with whom the defendant agreed in writing that "the present lessee and occupant of the first floor of the house may continue to use and occupy the said premises as long as I hold the lease thereof." In an action brought by S to recover damages against C for putting up the partition, it was held that the parol evidence, showing that the plaintiff took the agreement from the defendant with the knowledge what were the rights and obligations of A the first undertenant in the premises, was competent. *Steffens v. Collins*, 6 Bosw. (N. Y.) 233. Where a party granted a manor by particular name, and had two manors of that name, parol evidence was admitted to show which of them he meant; and where there was a demise of premises in Westminster, late in the occupation of A, particularly describing them, part of which was a yard, parol evidence was received to show that a cellar situated under that yard, but which was then in the occupation of B, another tenant of the lessor, was not intended to pass. *Freeland v. Burt*, 1 T. R. 701; *Paddock v. Fraley*, 1 C. & J. 90. Evidence of usage was received to show that a room which had not been occupied with a certain messuage did not pass under a demise of that messuage, together with all the rooms, chambers and appurtenances thereto belonging. *Kerslake v. White*, 2 Stark. 508. Where a lease grants a right of way, evidence may be received of the state of the premises at the time of granting the lease, and then the judge will put a construction on the lease as to the line along which the way granted runs; but if it is uncertain on the words which of two ways is intended, parol evidence may be given to show which the grantor meant. *Osborne v. Wise*, 7 C. & P. 761. Where an expression used in a written instrument has a technical meaning, parol evidence is admissible to show that it has been in that sense, and not in its ordinary meaning in common parlance,

although that may be perfectly clear and unambiguous in itself; therefore, where a lessee of a coal mine covenanted to get the whole of the mines, "not deeper than or below the level of the bottom of the mine" at a particular point, it was held, that parol evidence of the understanding amongst miners was admissible to show that the word "level" had a particular technical meaning different from its ordinary signification of a "horizontal line." It might be questionable whether a previous agreement between the parties for a lease of the same mine, and for which the lease in question was substituted, was also admissible in evidence for the same purpose. *Clayton v. Gregson*, 5 Ad. & El. 802; *Shore v. Wilson*, 9 Cl. & F. 365. Again, where in a lease of a rabbit warren, &c., the lessee covenanted that on the expiration of the term he would leave on the warren 10,000 rabbits, the lessor paying for them 60*l.* per thousand, it was held, that parol evidence was admissible to show that, by the custom of the country where the lease was made, the word "thousand," as it applied to rabbits, denoted twelve hundred. *Smith v. Wilson*, 3 B. & Ad. 728. Where the lessee of a coal mine covenanted to pay a certain share of all such sums of money as the coals should sell for at the pit's mouth, evidence of the lessee's having accounted with the lessor, and paid him the share of money produced by the sale of coals elsewhere, was not considered admissible to explain the intention of the parties. *Clifton v. Walmsley*, 5 T. R. 564; *Gerrard v. Clifton*, 7 T. R. 676. Where a lessee made an agreement for a lease, and the under-lessee contracted to erect a shop-front to the house; in ejectment for a forfeiture for not erecting the shop-front, it was held, that the original lease by which a penalty was imposed, if the lessee allowed a trade to be carried on upon the premises, was not admissible in evidence for the defendant to explain the meaning of the words "shop-front" in the agreement. *Nash v. Birch*, 1 M. & W.

rendering the words and language of the document certain and manifest, and must leave no doubt as to the correct application of them, and the precise object to which they were intended to refer ; for parol evidence is inadmissible to ascertain and establish the intention as an independent fact. The judgment of the court in expounding a deed

402. Where A being tenant to B, under a lease containing covenants, by which the former was bound to fetch seventy-five bushels of coal yearly, and deliver them at the mansion-house of the latter, and also to supply him with as much good wheat as he should want in his family at 5s. per bushel, it was agreed between them that the lease should be surrendered up, and a new one granted, omitting the above covenants; and a new lease was accordingly executed, and at the same time an agreement entered into, whereby A agreed with B that he would fetch and bring to the dwelling-house of B, his heirs and assigns, seventy-five bushels of coals yearly, for twelve years (the term of the new lease), and yearly supply B, his heirs and assigns, with as much good wheat as he should want in his family at 5s. per bushel; it was held, upon B's having parted with his reversion in the farm, and also quitted the mansion house in which he resided at the time when the agreement was made, that the agreement, being entire, must receive one uniform construction; as it was clearly local in respect of the delivery of coals, it could not be deemed personal with respect to the wheat; and that no parol evidence could be admitted to explain the agreement, there being no latent ambiguity. *Coker v. Guy*, 2 B. & P. 565. If there be any ambiguity or contradiction in expressing the time of the commencement of a lease, the lease shall be construed beneficially for the lessee, on the principle that every man's grant shall be taken most strongly against himself. *Anon.*, *Dyer*, 261 b, pl. 28; *Lilley v. Whitney*, *Dyer*, 272 a; *Seamen's Case*, *Godb.* 166; *Davies v. Williams*, 1 H. Blac. 25; *Shep. Touch.* 88, s. 6. Where a man granted an estate for life,

without saying whether it was for his own life or for that of the grantee, parol evidence was received to show what interest he had in the estate; for if he was tenant in fee, it was considered that the grantee should take an estate for his own life; but that if the grantor himself was a tenant for life only, the grantee would take an estate for the grantor's life only. *Smith v. Earl of Jersey*, 2 Brod. & B. 551; 3 Moo. 339; 7 Price, 281; 3 Bligh, 290. The express terms of a lease cannot be controlled by the custom of the country; yet if the lease be entirely silent as to the time of quitting, evidence of the custom of the country may be given to fix the time. *Webb v. Plummer*, 3 B. & Ald. 746. Although no right to an away-going crop is reserved in a lease, if there are no covenants which, either in express terms or by implication of law, exclude such right, the lessee may produce parol evidence to show that he is entitled to such away-going crop by the custom of the country. *Caldecott v. Smythies*, 7 C. & P. 708; *Wigglesworth v. Dallison*, 1 Doug. 201; 1 Smith's L. C. 453, 460 (4th ed.); *Wilkins v. Wood*, 17 L. J. Q. B. 319; *Hutton v. Warren*, 1 M. & W. 466; *Faviell v. Gaskoin*, 7 Exch. 273; *Muncey v. Dennis*, 1 H. & M. 216; *Holding v. Pigott*, 7 Bing. 465. So evidence of custom for an away-going tenant to provide work and labor, tillage and sowing, and all materials for the same in his away-going year, the landlord making him a reasonable compensation, has been received, although there was an express written agreement between the parties, but which was not inconsistent with such custom. *Senior v. Armytage*, *Bart. Holt*, 197; *Hutton v. Warren*, 1 M. & W. 466, 476.

must be simply declaratory of what is in the deed ; it has to ascertain, not what the party intended, as contra-distinguished from what the words express, but what is the meaning of the words he has used.¹ And when the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty, as to the proper application of those words to claimants under the instrument or the subject-matter to which the instrument relates, the instrument is always to be construed according to the strict, plain and common meaning of the words themselves ; and evidence *dehors* for the purpose of explaining the instrument according to the surmised intention of the parties is inadmissible.

To explain a patent ambiguity, parol evidence is never admissible, whatever doubt may exist as to the intention of the parties. Thus, if a blank is left in a lease or deed, unless it can be filled from inferences drawn from the instrument itself, it must remain blank, and cannot be cured by extrinsic evidence.²

It may be shown that the lease was made for the benefit of a person other than the lessor, as, where a lease was made by an administrator in his own name, that it was, in fact, made for the benefit of the estate.³ So, where no time when the lease shall commence is named therein, it is competent to show what time was fixed upon by parol ;⁴ or that the lease was in fact executed upon a different day from that named in the lease ;⁵ or that it has been surrendered ;⁶ or when the lessee actually took possession.⁷ So it is competent to show, by parol, that the landlord knew the purpose for which the lessee intended to occupy the premises, unless the character of the occupancy is expressly restricted in the lease, or that the lessee knew their condition, or, in the case of a sub-tenant, that he knew the conditions of the lease

¹ 18 Law J. N. S. (Exch.) 365.

² Baylis v. Church, 2 Atk. 239 ;
Strode v. Russell, 2 Vern. 624.

³ Russell v. Erwin 41 Ala. 292.

⁴ Leggett v. Harding, 10 Ind.
414.

⁵ Hall v. Huffman, 32 Mo. 519 ;
Trustees v. Robinson, Wright
(Ohio) 436.

⁶ Mairs v. Sparks, 5 N. J. L. 513.

⁷ Den v. Hamilton, 12 N. J. L.
109.

under which the original tenant holds.¹ Where in a lease it is stipulated that the lessee "shall have all the personal property," it is proper to show, by parol, whether he was to have it absolutely, or only the use of it.²

Customary rights and incidents universally attaching to the subject-matter of the contract in the place and neighborhood where the contract was made, are impliedly annexed to the written language and terms of the contract, unless the custom is particularly and expressly excluded. Parol evidence of custom and usage,³ consequently, is always admissible to enable us to arrive at the real meaning of the parties who are naturally presumed to have contracted in conformity with the known and established usage. Thus, the custom of the country in regard to the claims of an outgoing tenant of a farm will prevail, although there be a lease under seal regulating the terms of the holding, but not containing stipulations as to the terms of quitting, which can exclude the custom.⁴ The customary right of a tenant to the away-going crop, to compensation for work and labor, seed, and materials employed in manuring, tilling, and sowing the land, also the customary right of a landlord or reversioner to a heriot on the death of a tenant for life, and all customs and usages respecting the cultivation of the soil and the mode of husbandry, will impliedly prevail, if the lease is silent respecting them, and parol or oral evidence is, consequently, admissible to superadd

¹ In *Steffins v. Collins*, 6 Bos. (N. Y. Supr. Ct.) 223, the defendant, C, having a lease of a store, underlet to A the whole of the first floor excepting a portion thereof which was then partitioned off, and which consisted of the stairway, with a hatchway in front, leading to the upper stories of the building. There were two doors in the front, the one opening opposite the stairway and the other into the lower room, into which there was also access through a door in the partition. The under-tenant, A, with the consent of his lessor, removed the partition, agreeing to restore it when requested so to do. Afterwards A sold out to the plaintiff, S, with

whom the defendant agreed in writing that "the present lessee and occupant of the first floor of the house may continue to use and occupy the said premises as long as I hold the lease thereof." In an action brought by S to recover damages against C for putting up the partition, it was held, that parol evidence, showing that the plaintiff took the agreement from the defendant with the knowledge of what were the rights and obligations of A, the first under-tenant in the premises, was competent.

² *Knapp v. Marlboro*, 29 Vt. 282.

³ *Hutton v. Warren*, 1 M. & W. 475, 476; *Domat*, liv. 1, tit. 1.

the usage and customary right to the contract between the parties, such right and usage being recognized by law as incident to the subject-matter of the contract, and consequential upon the taking of the lands.¹ *But parol evidence of custom and usage is not admitted to contradict or vary express stipulations and provisions restricting or enlarging the exercise and enjoyment of the customary right.* Omissions may be supplied by the introduction of the custom, but the custom cannot prevail over and nullify the express provisions and stipulations of the contract.² If a lease, for example, contains an express provision as to the disposal of the away-going crop, or specifies and regulates the particular allowances that are to be made by an incoming to an outgoing tenant, the custom in respect thereof is excluded.³

The known and received usage of a particular trade or profession, and the established course of every mercantile or professional dealing, are considered to be tacitly annexed to the terms of every mercantile or professional contract, if there be no words therein expressly controlling or excluding the ordinary operation of the usage, and parol evidence thereof may consequently be brought in aid of the written instrument.⁴ Thus, although a bill of exchange is on the face of it payable on a day certain, yet the three additional days of grace, accorded by the known custom of merchants, are permitted to be annexed to the terms of the written instrument, and make a part of the contract. The general warranty in a policy of insurance to sail with convoy, is construed, according to the usage of merchants, to depart with convoy from the nearest customary place of rendezvous where convoys are to be had.⁵ When a workman is hired for a year, to

¹ Wigglesworth v. Dallison, 1 Doug. 201; Wilkins v. Wood, 17 Law J. Q. B. 819.

² Clarke v. Royston, 13 M. & W. 752; 14 Law J. Exch. 143; Taylor on Ev. p. 771; Blackett v. R. Ex. Ass. Co., 2 C. & J. 249.

³ Roxburghe v. Robertson, 2 Bligh. 156; Webb v. Plummer, 2 B. & Ald. 746; Roberts v. Barker, 1 C. & M. 808.

⁴ Syers v. Jonas, 2 Exch. 111; Grant v. Maddox, 15 M. & W. 737; Hutton v. Warren, 1 M. & W. 475; Bourne v. Gatliffe, 3 Sc. N. R. 40; Sewall v. Gibbs, 1 Hall (N. Y.) 602; Astor v. Union Ins. Co., 7 Cow. (N. Y.) 202; Piesch v. Dixon, 1 Mas. (U. S.) 11.

⁵ Lethulier's Case, 2 Salk. 448.

work at a particular trade, under a written agreement which says nothing as to any period of absence to be allowed to the workman, oral evidence may be given to show that it is the custom of particular trade for the workmen employed in it to take certain holidays, and to absent themselves on such occasions from their work, without the permission of their masters.¹

"In all contracts," observes PARKE, B., "as to the subject-matter of which known usages prevail, parties are found to proceed with the tacit assumption of these usages; they commonly reduce into writing the special particulars of their agreement, but omit to specify these known usages which are included, however, as of course, by mutual understanding; evidence, therefore, of such incidents is receivable. The contract, in truth, is partly express and in writing, partly implied or understood and unwritten. But the evidence received must not be of a particular which is repugnant to, or inconsistent with, the written contract." "The usage," observes WILDE, C. J., "is admissible for the purpose of annexing incidents to the contract in matters upon which the contract is silent, but not to vary or contradict, either expressly or by implication, the express terms of the written instrument." Therefore, where a written memorandum of a contract for the sale of certain specified bales of wool at an ascertained price, stated that they were "to be paid for by cash in one month," it was held that the contract imported a sale upon a month's credit; that the vendor was entitled to delivery of the goods without payment of the price, and that evidence of a usage in the wool trade, that under contracts framed in similar terms, the vendors were not bound to deliver without receiving payment of the price, was inadmissible to alter the plain import of the written instrument. "We think," observes WILDE, C. J., "that the admission of the evidence would be to allow a right to be set up inconsistent with and contradictory to the terms of the contract, and to annex

¹ Reg. v. Stoke-upon-Trent, 13 Law J. Q. B. 117.

² Brown v. Byrne, 3 Ell. & Bl. 715.

an incident to the subject-matter, which if not expressly is clearly impliedly excluded by the contract."¹

Custom and usage also influence the interpretation of contracts, and determine to a great extent the meaning of the words used therein. If, by the known usage of trade, or by custom, a word has acquired, in respect of the subject-matter of the contract, a peculiar sense and meaning different from the ordinary popular sense and meaning, parol evidence is admissible to show that the parties used the word in its customary trade acceptation, and not in the ordinary popular sense. Thus, the word *thousand* in certain trades comprehends a larger number of units than it does in its ordinary acceptation. In the herring trade, for example, *six* score herrings go to the hundred, and *sixty* to the thousand; and parol evidence is consequently admissible to show that the word thousand, when applied to herrings, in the contracts of herring dealers means twelve hundred. In a lease of a rabbit warren, parol evidence was admitted to show that by the custom of the country where the lease was made, in taking an account of the rabbits on a rabbit warren, the numbers were computed at one hundred dozen to a thousand, and the word "thousand" in a lease as applied to rabbits was consequently construed to mean one hundred dozen or twelve hundred.² So, where an insurance was effected "to any port in the Baltic," evidence was admitted to show that the Gulf or Finland was considered, by universal custom and consent amongst merchants and in mercantile contracts, to be within the Baltic, though the two seas were treated as distinct by geographers.³ And in a lease of a coal mine evidence was admitted to show that the word "*level*" in mining districts had a meaning different from the ordinary popular meaning, and that the word was used by the parties to the contract in the sense in which it is ordinarily employed by miners.⁴ But the

¹ *Spartali v. Benecke*, 10 C. B. 221.

² *Smith v. Wilson*, 3 B. & Ad. 728.

³ *Uhde v. Walters*, 3 Camp. 16. See also *Brough v. Whitmore*, 4 T.

R. 210; *Anderson v. Pitcher*, 2 B. & P. 168.

⁴ *Clayton v. Gregson*, 5 Ad. & El. 302; *Hunt v. Otis Company*, 4 Met. (Mass.) 464; *Batterman v. Pierce*, 3 Hill (N. Y.) 174; *Parrot*

custom and usage must be general and universal, and not the practice or course of dealing of a particular firm or house of trade.¹

The meaning of all words and terms of art, and specifications of quantity, quality, weight, and measure, are regulated and controlled by local custom, unless the terms have been selected, and a definite meaning given to them by the legislature.² Evidence of general usage, in the trade to which the contract refers, is admissible to give a particular and peculiar sense to the words employed, as the parties may be presumed to have contracted in conformity with the custom, and to have used the words in their customary trade acceptation. A memorandum of a contract of sale was in the terms following:—"Sold Mr. W. S. 18 pockets of Kent hops, at 100s.;" and it was held that oral evidence was admissible to show that, by the usage of trade, a contract so worded was understood to mean 5*l.* per cwt., and that the hops consequently were to be weighed, and the price ascertained, according to the weight of the article, and that the 100s. was not to be paid per pocket, without reference to the weight of the contents of such pocket.³ But to vary the meaning of plain words, the existence of the custom must be "clear, cogent, and irresistible." Two witnesses stated that the usual practice of the trade to Sydney was to consider steerage passengers as "cargo," and their passage money as "freight;" but could give no instances of such construction within their own knowledge, and it was held that the evidence was insufficient to establish a usage of trade, so as to vary the *prima facie* meaning of the words cargo and freight in a written contract.⁴ A usage of trade can never be set up in contravention of a rule of law, or in opposition to a plain and clearly

v. Thatcher, 9 Pick. (Mass.) 426; Collins v. Hope, 8 Wash. (U. S.) C. C. 149; Trott v. Wood, 1 Gall. (U. S.) 448; Dawson v. Kettle, 4 Hill (N. Y.) 107.

¹ Gabay v. Lloyd, 8 B. & C. 797.

² Taylor v. Briggs, 2 C. & P. 525; Hutchison v. Bowker, 5 M. & W. 535.

³ See Eyre v. Marine Ins. Co., 5 W. & S. (Penn.) 116; Allegre v. Maryland Ins. Co., 2 G. & J. (Mass.) 136; Macy v. Whaling Ins. Co., 9 Metc. 354; Spicer v. Cooper, 1 Q. B. 424.

⁴ Louis v. Marshall, 13 Law J. C. P. 193.

expressed intention. If there are peculiar expressions used in a contract or lease, which have in a particular place or trade a known meaning attached to them, it is for the jury to say what the meaning of those expressions was, but for the court to decide what the meaning of the contract is.¹

The import and meaning of words at length cannot be contradicted or altered by figures. Where the figures and words of a bill of exchange or a promissory note, for example, disagree, the courts will give force to the words at length, in preference to the figures, for the reason assigned by Marius, "because a man is more apt to commit an error with his pen in writing a figure than he is in writing a word." It may be shown that a parol agreement was entered into *subsequent* to the lease, which although in writing is not under seal, by which its term never changes, as that the landlord agreed to accept a reduced rent² or that the lessor agreed to pay the taxes which by the terms of the lease the lessee was to pay.³

¹ *Hutchison v. Bowker*, 5 M. & W. 542; 8 ib. 823; *Trueman v. Loder*, 11 Ad. & El. 599; *Sotilichos v. Kemp*, 8 Exch. 105.

² In an action for the rent reserved in a written lease, the lessee may prove in defence, that, after the delivery of the lease, the lessor for a good consideration entered into an oral agreement that for the future the rent should be reduced. *Hastings v. Lovejoy*, 140 Mass. 261.

³ In 1874 a lease of a building in a city was made for the term of ten years, the lessee agreeing to pay rent and taxes. The tax bills were made out to the lessor, and he, in 1875 and 1876, sent them to

the lessee, who paid them to the city. In 1877 the lessor agreed orally that, if the lessee would pay rent then due, and thereafter pay rent promptly, he would assume the taxes. The lessor paid the taxes for several years, ending in 1882. Two months after paying the taxes for that year, the lessor notified the lessee that unless he would renew the lease he would be called upon for the taxes of that year. The lessee refused to renew the lease. It was held that these facts constituted no defence to an action by the lessor against the lessee for the amount of the taxes of 1882. *Bowditch v. Chickering*, 139 Mass. 282.

CHAPTER XXX.

COVENANTS.

- SEC. 301. Express covenants.
SEC. 302. Covenants for payment of rent.
SEC. 303. Construction of covenants.
SEC. 304. Liability of the parties and their assigns.
SEC. 305. When covenants are void or nugatory.
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SEC. 308. Divisibility of liability on covenants.
SEC. 309. Dependent or independent.—General rule with respect to such covenants.
SEC. 310. Particular cases decided respecting repairs.
SEC. 311. Cases decided respecting other matters.
SEC. 312. How covenants are discharged generally.
SEC. 313. When discharged by the operation of statutes.

SEC. 301. **Express covenants.**—A covenant is either express or implied, and subsists either in fact or in law.¹ An express covenant is a stipulation in a deed, either that a certain thing has or has not been, or shall or shall not be done. It may, perhaps, more properly be said to be *an agreement of the parties under seal*,² and no formal or technical words are necessary to create it; *any* words in a deed or other contract under seal, that show an agreement on the part of either of the parties thereto to do or not to do a thing, amount to a covenant.³ The

¹ Woodfall's L. & T. 97.

² LORD ELLENBOROUGH, in *Randall v. Lynch*, 12 East, 182. It may be created by deed poll, *Randel v. Canal Co.*, 1 Harr. (Del.) 151, or by indenture. 1 Rolle's Abr. 517.

³ *Sampson v. Easterby*, 6 Bing.

644. The law requires no set form of words to create a covenant. It

is enough if the language of a sealed instrument is such as to show that the parties thereto have assented to the performance or forbearance of a future act. *Marshall v. Craig*, 1 Bibb (Ky.) 379; *Yocum v. Barnes*, 8 B. Mon. (Ky.) 496; *Hallett v. Wylie*, 3 John. (N. Y.) 44; *Stevenson's Case*, 1 Leon, 324;

words "covenant and agree," are usually employed, but of themselves they do not raise a covenant, nor does their absence prevent the agreement from being a covenant. The only indispensable requisites are, *that there shall be an agreement between the parties, and that it shall be under seal*. Thus, the words "I hereby agree to pay A four dollars a day for his services, &c., and to pay him the amount of wages due him each week," signed and sealed by a party, is a sufficient covenant;¹ or, "I hereby agree not to carry on the trade of a blacksmith in A for the period of ten years from the date," predicated upon a good consideration, and signed and sealed, is a covenant, though the word "covenant" is not used.² A mere recital in a lease, or an exception, may amount to a covenant, if, from the whole instrument, such appears to have been the intention of the parties.³ Thus, in a lease of land the lessee covenanted to plough and sow

Cannock v. Jones, 8 Exchq. 283; Wright v. Tuttle, 4 Day (Conn.) 321; Jackson v. Stewart, 20 John. (N. Y.) 85; Midgett v. Brooks, 12 Ired. (N. C.) L. 145; Mitchell v. Hazen, 4 Conn. 508; Randel v. Canal Co., 1 Harr. (Del.) 283; St. Albans v. Ellis, 16 East, 852; Hollis v. Carr, 2 Mod. 87; Comyn's Digest, tit. Covenant; Lunt v. Norris, 1 Burr. 290; Hill v. Carr, 1 Ch. Cas. 294; Bret v. Cumberland, Cro. Jac. 899. These words in a lease, "and the lessee shall repair the mill (being the thing leased) as often as need shall require, and shall leave them sufficiently repaired at the end of the term," amounts to a covenant to repair, and leave in repair, because it is a clear agreement of the parties. Bret v. Cumberland, Cro. Jac. 899. See also, Anonymous, 1 Rolle's Rep. 859, pl. 391. So where a lease contained a stipulation that the lessee should repair, "provided always, and it is agreed, that the lessor shall find great timber, &c.," it was held that this amounted to a covenant on the lessor's part to find great timber, because it amounted to an agreement on his part to do so, and that it was not a mere qualification of the lessee's covenant. Holder v. Taylor, Brownl.

28. But in the same case it was held, that except for the use of the words, "and it is agreed," the words "the lessor shall find great timber," would not have amounted to a covenant on his part to do so absolutely, but would have been a mere qualification of the lessee's covenant. A lease from A to B, "upon condition that he shall acquit A of ordinary and extraordinary charges, and shall keep and leave the houses at the end of the term in as good condition as he found them," is a covenant. 6 Viner's Abr. tit. Covenant, 879. Whatever shows an intention on the part of parties thereto to bind themselves to the performance of a stipulation, is a covenant. Taylor v. Preston, 79 Penn. St. 461.

¹ Randel v. Canal Co., ante.

² Grundy v. Edwards, 7 J. J. Marsh. (Ky.) 868.

³ Sampson v. Easterby, 9 B. & C. 505; Say v. Mattram, 19 C. B. N. S. 479; Farrall v. Hilditch, 5 id. 840; St. Albans v. Ellis, 16 East, 852; Horry v. Frost, 10 Rich. (S. C.) Eq. 109; Penn v. Preston, 2 Rawls (Penn.) 14; Lowell v. Hilton, 11 Gray (Mass.) 407; Huff v. Nickerson, 27 Me. 106.

certain land, "except the rabbit warren and sheep walk," and he having ploughed and sowed a part of the rabbit warren and sheep walk, it was held a breach of the covenant, the court holding that the exception was as much a covenant or agreement as the rest of the stipulation, and that the word "except," in the covenant, was to be read the same as though the words "but not" had been used.¹ So, where a lease of the lessor's interest in certain

¹ *St. Albans v. Ellis*, ante. In *Gravenor v. Parker*, And. 19, pl. 88, a lease for life from A to B, provided that if the lessee dies his executor shall hold it for the balance of the term, was held a covenant, because the words of the proviso purported an agreement. When the lessor recites that he is possessed of a certain interest in an estate, he thereby covenants that he is possessed of such an interest. *Severn's Case*, 1 Leon. 122; *Aspdin v. Austin*, 5 Q. B. 688. Thus, if A makes a lease to B, and recites therein that he is termor for 99 years if three lives so long continue, and that one life is in being, it is held to amount to a covenant that the life continued. *Holles v. Carr*, 3 Swanst. 648. So the recital in a deed of a previous agreement to do a certain act, amounts to a covenant in a deed for the performance of it, for the recital operates as a solemn confirmation of the "agreement and intent precedent." *Barfoot v. Freswell*, 3 Keb. 465. But a recital does not necessarily imply a covenant, and whether it does so or not in each case depends on what is to be collected as the intention of the parties from the whole instrument. *Ivens v. Elwes*, 24 Law J. Ch. 249. Words of proviso and condition will also be construed as an express covenant, when such a construction is necessary to give effect to the apparent intention of the parties. Thus, where a conveyance was made by the plaintiff of an incorporeal right to the defendant, provided that out of the first profits the defendant should pay the plaintiff 500*l.*, it was held that an action of covenant might be maintained on these words of proviso for the non-payment of the money. *Clapham v.*

Moyle, 1 Keb. 842, 897. Where a lease executed by the lessor and lessee contained a covenant on the part of the lessee to maintain and repair a farm-house and premises, "the said farm-house and buildings being previously put into repair" by the lessor, it was held that these words amounted to an absolute covenant on the part of the lessor to put the house into repair, and not merely to a qualification of the covenant of the lessee. *Connock v. Jones*, 3 Exch. 233. So, where a lease was granted on condition that the lessee should keep and leave the demised premises at the end of the term in as good plight as he found them, it was held that an action of covenant would lie for a breach of this condition. Where, however, the proviso or condition is by way of qualification of the covenant, or defeazance of the deed or of the estate and interest thereby created, and not in the nature of an agreement; as, if a lease be granted, provided and on condition that the lessee collect and pay the rents of the other houses of the lessor, an action of covenant is not maintainable. If lessee for years covenants to repair, "provided always and it is agreed that the lessor shall find great timber, &c.," a covenant is created on the part of the lessor to find the timber by reason of the word "agreed;" but if the lessee had covenanted to repair provided the lessor found the timber, without the word "agreed," the proviso would not have amounted to a covenant on the part of the lessor, but to a qualification only of the covenant of the lessee. 1 Rolle Abr. 518; Bac. Abr. Cov.; *Geery v. Reason*, Cro. Car. 128; *Simpson v. Titterell*, Cro. Eliz. 242; *Wolve-*

mines contained a recital of an agreement made by the lessee with the lessor and the owners of the other two-thirds interest in the mines, for pulling down an old smelting mill and building another of larger dimensions upon a waste near the mines, and the lease contained a covenant to keep such new mill in repair, and so leave it at the expiration of the term, but did not contain any covenant to build the mill; it was held, that a covenant to build the mill was to be implied from the recital and other covenants in the lease, and that the lessor might sue thereon for damages for its breach in respect of his third interest. And so, generally, the question as to whether or not a recital, exception, proviso, &c., contained in a deed is a covenant or a mere qualification of a covenant, is to be ascertained from the facts whether it amounts to an absolute agreement on the part of the

ridge v. Stewart, 3 M. & S. C. 566. A lessee covenanted that he would at all times during the continuance of his lease fold his flock of sheep which he should keep upon the demised premises upon such parts where the same had been usually folded. It was held that this amounted to a covenant to keep a flock of sheep upon the premises, and that it would consequently be no answer to an action upon the covenant for the defendant to say that he kept no sheep, and therefore had none to fold. *Webb v. Plummer*, 2 B. & Ald. 749. A landlord demised certain limestone quarries and lime kilns to a tenant, who covenanted, amongst other things, that he would, at all times and seasons of burning lime, supply the lessor and his tenants with lime at a stipulated price, for the improvement of their lands and the repair of their houses; and it was held that this amounted to a covenant to burn lime at such seasons, and that it was not a good defence to plead that there was no lime burned on the premises out of which the lessor could be supplied. *Earl Shrewsbury v. Gould*, 2 id. 487. If two persons covenant together that it shall be lawful for the one to hold possession of the other's property for a certain time,

the law infers therefrom an agreement that he shall not detain it for a longer time, but shall then give it up to the owner; if, then, he detains it beyond that time, it is a breach of covenant. Therefore, where it was covenanted and agreed in a charter-party of affreightment, that "forty days should be allowed for unloading a vessel and loading her again," it was held that this amounted to a covenant not to detain the ship for loading and unloading beyond the forty days. *Randall v. Lynch*, 12 East, 182. Where recitals are made by a party under misapprehension and mistake, or in consequence of the fraud of the other party, it will not be regarded as conclusive upon the party in equity, and he will be permitted to show by parol that the recital is not true, and that it was inserted in the covenant under a misapprehension and mistake. *Rich v. Atwater*, 16 Conn. 409. But at law the recital is conclusive and cannot be contradicted or attacked by parol evidence. *Jackson v. Munroe*, 9 Wend. (N. Y.) 209; *Shelton v. Alcock*, 11 Conn. 240; *Stow v. Wyse*, 7 Conn. 214; *Carver v. Jackson*, 4 Pet. (U. S.) 82; *Shelley v. Wright*, Willes, 9.

person sought to be charged with the covenant to do or not to do the thing named, or whether it merely amounts to a qualification of a covenant on the part of the other party, excusing him from performance because of the non-performance of the person seeking to charge him as covenantor.¹

SEC. 302. *Covenants for payment of rent.*—The words “yielding and paying” in a lease make an implied covenant at least, and the lessee is liable thereon for the non-payment of the rent.² So if the lease provides that the lessee shall yield and pay such a rent and all manner of taxes, charges and impositions whatever, it is held a covenant to pay *the whole rent* discharged of all taxes before or afterwards imposed.³ An express covenant to pay rent should be inserted in all leases, as if there is only an implied covenant it is inoperative if the lessee assigns his term, as such covenants rest merely upon a privity of estate;⁴ but where there is an express covenant it rests upon privity of contract, and the lessee remains liable as well after as before he assigns his estate.⁵ If, in case the premises are destroyed by fire or other casualty, it is intended that the rent shall cease, an express provision to that effect must be inserted in the lease, or liability for rent will continue on the lessee’s part as well *after* the destruction of the premises as before, and the fact that the lessee covenants to repair, &c., “except damages by fire,” does not limit the operation of the covenant to pay rent,⁶ or excuse the tenant therefrom.⁷

In New York, however, by statute, the tenant is excused from his covenant to pay rent, if the building, without his fault, is so destroyed or injured as to be

¹ *Estebey v. Sampson*, 6 Bing. 644. See also, *Hayes v. Kershaw*, 1 Sandf. Ch. (N. Y.) 258.

² *Porter v. Swetnam*, Styles, 496; *Kimpton v. Walker*, 9 Vt. 191, but in the case last cited, it was held that such words, creating an implied covenant only, the lessee was not liable thereon after he had assigned his term. See also, *Bret v. Cumberland*, Cro. Jac. 523;

Adams v. Gibney, 6 Bing. 656; *Staines v. Morris*, 1 V. & B. 8.

³ *Giles v. Hooper*, Carth. 135.

⁴ *Bret v. Cumberland*, ante; *Kimpton v. Walker*, ante.

⁵ 2 Platt on Leases, 163; *Auriol v. Mills*, 4 T. R. 98.

⁶ *Hore v. Groves*, 3 Anst. 387. See Chapter on Rent, post.

⁷ 2 Platt on Leases, 166. See post, pp.

untenantable or unfit for occupancy, so long as such premises from such causes remain untenanted or unfit for occupancy, unless there is an express covenant to the contrary.' But, under this statute it is not only held, that, in order to suspend the tenant's liability for rent the premises must, from such causes, have become unfit for occupancy, but *the tenant must not have remained in the occupancy thereof*,¹ and he is not excused from liability because the landlord refused to accept a surrender upon the ground that the alleged causes do not exist.² But it seems that the tenant may remain temporarily in possession of premises injured by fire for the purpose of selling off goods damaged by the casualty without incurring liability upon the covenants in his lease, for the rent of the premises during such temporary occupancy, but he is liable for use and occupation.³

The advantages incident to an express over an implied covenant are that the tenant's liability to pay rent under the implied covenant being founded on privity of estate only, determines on his assigning the property to another;⁴ but under the privity of contract arising from the express covenant, he remains chargeable during the whole period of tenancy,⁵ and as it is in his power, unless expressly restrained by agreement, to assign the premises to another, without regard to the assignee's character or responsibility,⁶ the express covenant possesses an obvious advantage over the implied one. So again, as the

¹ Laws of 1860, Chap. 845, Sec. 1.

² Willard v. Tillman, 19 Wend. (N. Y.) 358. In Johnson v. Oppenheimer, 55 N. Y. 280, an adjoining proprietor made an excavation upon his premises that caused the walls of the demised premises to settle, and thus rendered them untenanted, but the tenant refused to give the landlord permission to enter for the purpose of putting in proper supports to the walls, and it was held, that under these circumstances he was not absolved from his liability to pay rent.

³ Johnson v. Oppenheimer, ante.

⁴ Austin v. Field, 7 Abb. Pr. N. S. (N. Y.) 29.

⁵ Bret v. Cumberland, ante; Barhelouse v. Gage, W. Jones, 223; Anonymous, 1 Sid. 447; Staines v. Morris, 1 V. & B. 8.

⁶ Edwards v. Morgan, 8 Lev. 283; Buckland v. Hull, 8 Ves. 95; Staines v. Morris, ante; Auriol v. Mills, 4 T. R. 98.

⁷ Pitcher v. Tavey, 1 Salk. 81; Le Keux v. Nash, 2 Stra. 1231; Onslow v. Corrie, 2 Madd. 830; Taylor v. Shum, 1 B. & P. 21; Treackle v. Coke, 1 Vern. 165; Rawley v. Adams, 4 My. & Cr. 534.

lessee invariably covenants for his heirs, as well as for himself, his executors, &c., the lessor has the security of the lessee's real estate in the heirs' hands for the payment of rent, an advantage not conferred by the implied covenant."¹ An express covenant for payment of rent runs with the land and binds an assignee, even though the lessee does not covenant for his assigns.²

SEC. 303. *Construction of covenants.*—It is a uniform rule, that all covenants must be construed as nearly as possible according to the intention of the parties, to be gathered from the whole context of the lease, and according to the reasonable sense of the words used;³ and where it is evidently the intention of the parties that

¹ Newton v. Osborne, Sty. 367.
² Vyvyan v. Arthur, 1 B. & C. 410; Stevenson v. Lambard, 2 East, 575; Parker v. Webb, 2 Salk. 5; Halford v. Hatch, 1 Dougl. 183; Isteel v. Stoneley, 1 And. 89. See Chapter on Rent.

³ Foley v. Cowgill, 5 Blackf. (Ind.) 18; Wadlington v. Hill, 18 Miss. 560; Knowlden v. Leavitt, 121 Mass. 307; Shoneberger v. Hay, 40 Penn. St. 182; Barey v. Burch, 3 Mo. 447; Killian v. Harshan, 7 Ired. (N. C.) L. 497; Watchman v. Crook, 5 G. & J. (Md.) 239; Ross v. Adams, 28 N. Y. L. 160; Iggulden v. May, 7 East, 241. "*It is not the words of the law,*" says PLOWDEN in Egton v. Studd, Plowd. 465, "*but the internal sense of the law,* that makes the law; and our law, like all others, consists of two parts, viz: of body and soul. The letter of the law is the body of the law, *quia ratio legis est anima legis.* And the law may be resembled to a nut which has a shell and a kernel within,—the letter of the law represents the shell, and the sense of it the kernel, and as you will be no better for the nut if you make use only of the shell, so you will receive no benefit by the law if you rely only upon the letter; and as the fruit and profit of the nut lie in the kernel, and not in the shell, so the fruit and profit of the law consist in the sense more than in the letter. And it often happens that when you know the letter you know not the sense, for sometimes the sense is more con-

fined and contracted than the letter, and sometimes it is more large and extensive." Words are susceptible of various meanings, and may be read in an enlarged and general sense or may receive a confined and restricted interpretation, according to the subject-matter to which they refer, the local peculiarities to which they are applied, and the circumstances and situation of the parties to be controlled and influenced by them. Clayton v. Gregson, 4 N. & M. 606. The general intention, to be collected from the whole context, and every part of a written instrument, is always to be preferred to the particular expression. Gray v. Clark, 11 Vt. 583; Kelly v. Mills, 8 Ohio, 325; Patrick v. Grant, 14 Me. 233; Washburn v. Gould, 3 Story (U. S.) C. C. 133; Nettleton v. Billings, 13 N. H. 446; Warren v. Merryfield, 8 Met. (Mass.) 96. "Every deed," observes HOBART, C. J., "ought to be construed according to the intention of the parties, and the intent ought to be adjudged of the several parts of a deed as a general issue out of the evidence, and ought to be picked out of every part, and not out of one word only;" and such a construction should be put upon particular words as will best answer and effectuate the apparent general intention, "*ex ante cedentibus et consequentibus optima fit interpretatio, nam turpis est pars quæ cum suo toto non convenit.*" It ought also to be so construed that no

they should be taken distributively they will be so taken, although there are no words of severalty employed.¹ If the interest of the covenantors or covenantees is joint, the covenant will be treated as joint,² *but if their interests are several*, and the language used is susceptible of such a construction, *it will be construed as joint or several, according to the interests of the parties to it*;³ but if the words of the covenant are expressly and clearly joint, it will be so construed, although the interests are several, and *vice versa*,⁴ and in such cases an action upon the covenants must be joint; and all the parties represented in the action, either by themselves or their executors, &c., if any of them are dead;⁵ and the fact that some of the covenants are joint and some several does not change the rule, as each covenant, to that extent at least, must be

clause, sentence or word shall be superfluous, void or insignificant. Every word ought to operate in some shape or other; *nam verba debent intelligi cum effectu ut res magis valeat quam pereat*. One part must be so construed with another that the whole may, if possible, stand; but a clause or particular sentence totally repugnant to the general intent of the contract is void, and must be rejected. Winch, 93; Domat's Civil Law, l. 1, Tit. 1, § 2, xi.; Shep. Touch. 88. The terms of the contract "are to be understood in their plain, ordinary and popular sense, unless they have generally, in respect to the subject-matter, as by the known usage of trade or the like, acquired a peculiar sense distinct from the popular sense of the same words." Lord ELLENBOROUGH, Robertson v. French, 4 East, 137; Mallan v. May, 13 M. & W. 137; Scott v. Bourdillon, 5 B. & P. 213. Technical words, however, are to have their legal effect, unless from subsequent inconsistent words it is very clear that the parties used them in a sense different from their legal meaning, and the ordinary grammatical construction is to be followed, unless it is repugnant to the general context of the written instrument. Lees v. Mosley, 1 You. & C. 607; Sanderson v. Dobson, 1 Exch. 145.

When the words in the operative party of a deed of grant are clear and unambiguous they cannot be controlled by the recitals, but the recitals and all other parts of the deed must be regarded in order to fix the true meaning of the operative part. Walsh v. Trevanion, 15 Q. B. 751. The general words of a deed of release may be qualified and restrained by the recitals. "Common sense requires that it should be so, and in order to construe any instrument truly, you must have regard to all its parts." Payler v. Homersham, 4 M. & S. 426; Simons v. Johnson, 3 B. & Ad. 181.

¹ Walker v. Webber, 15 Me. 65; Ludlow v. McCrea, 1 Wend. (N. Y.) 228; Ernst v. Bartle, 1 John. Cas. (N. Y.) 319.

² Bradburn v. Botfield, 14 M. & W. 559; Hopkinson v. Lee, 6 Q. B. 964; Foley v. Addenbrooke, 4 id. 197; Pugh v. Stringfield, 3 C. B. N. S. 2.

³ James v. Emery, 2 Moore, 195; Sorsbie v. Park, 12 M. & W. 146; Wilkinson v. Hull, 1 Bing. N. C. 713; Harcourt v. Wyman, 3 Exch. 817; Foley v. Addenbrooke, 4 Q. B. 197; Pugh v. Stringfield, ante.

⁴ Lee v. Nixon, 1 Ad. & El. 201; Sorsbie v. Park, 12 M. & W. 146.

⁵ Thompson v. Hokewell, 19 C. B. N. S. 713.

construed by itself.' If two or more tenants in common of land make a joint lease at an *entire* rent, they may join in an action for its recovery; but if there be a separate reservation to each of his proportion of the rent, the action for rent must be separate. So far as their covenants are expressly joint, and so far as they are several, they may bring several actions.' It seems to be the rule that, where the parties to a covenant *may* join in an action thereon, they *must* do so.' The whole of a covenant is to be taken together, and that construction to be given to it which renders the whole operative; and if there is any doubt or ambiguity upon the sense of the words, or if they are susceptible of two constructions, that construction is to be placed upon them that is most strong against the person employing them, to wit, the covenantor; but if the covenant involves a forfeiture it

¹ *Jamés v. Emery*, 8 Taunt. 245, seems to be an authority for the rule that covenants in one part of a deed cannot be used to make those in another part either joint or several, and such was practically the doctrine of *Bradburn v. Botfield*, ante.

² *Foley v. Addenbrooke*, 4 Q. B. 197; *Powis v. Smith*, 5 B. & Ald. 851.

³ In *Foley v. Addenbrooke*, LORD DENMAN concludes by saying: "The case of *Petrie v. Bury*, 3 B. & C. 353, shows that, if the covenantees *could* sue jointly, *they are bound to do so*." It is a general rule, that when the covenant is joint all the obligees and covenantees must use. If these parties had all been tenants in common, and the covenants joint, they must have joined in the action. But here is a case where four have no interest at all. It is a covenant in gross, and all may sue upon it. To say that several of them may sue, or that four might sue in respect of their several interests, would be to overrule *Hopkinson v. Lee*, 14 L. J. N. S. Q. B. 101, and *Anderson v. Martindale*, 1 East, 497. In *Hopkinson v. Lee*, by articles of agreement under seal between the defendant, of the one part, and the plaintiff and A. C. Hogg, of the other part, after

reciting that the defendant, as solicitor of one D. E. had applied to the plaintiff to lend to D. E. the sum of £2900 out of certain moneys of the said A. C. Hogg, then in the plaintiff's hands in trust for A. C. Hogg, on the security of certain stock in the funds, and the covenant thereafter contained the defendant, in pursuance of the agreement, and in consideration of the premises, and of the plaintiff having advanced the sum of £2900 to the said D. E. at the request of the said defendant, did covenant with and to the plaintiff, his executors, &c., and also, as a separate and distinct covenant, with and to the said A. C. Hogg, her executors, &c., that he, the defendant, would pay the plaintiff, his executors &c., the regular interest on the £2900. It was held, that the plaintiff could not maintain an action on this covenant without joining A. C. Hogg. There cannot be a stronger case than that, for there the defendant covenanted as a separate and distinct covenant with Hogg, and if a separate action could have been maintained, it would have been in such a case.

⁴ *Randel v. Canal Co.*, 1 Harr. (Del.) 154.

⁵ *Bacon's Abridgement*, tit. Covenant (F); *Doe v. Stevens*, 3 B. & Ad. 303; *Bushnell v. Proprietors*,

will be construed strictly against the party claiming the

&c., 81 Conn. 150; *Mills v. Catlin*, 23 Vt. 98; *Dunn v. English*, 28 N. J. L. 126; *Hogg's Appeal*, 11 Penn. St. 479; *Watson v. Boylston*, 5 Mass. 411; *Alton v. Trans. Co.*, 11 Ill. 18. And where the instrument will inure several ways, the grantee may elect which way to take it. *Jackson v. Hudson*, 8 John. (N. Y.) 875. The *particular* intent will govern the *general* intent, *Dawes v. Prentice*, 16 Pick. (Mass.) 435, and the grammatical sense will not be adhered to when such a construction would be contrary to the apparent intent of the parties. *Hancock v. Watson*, 18 Cal. 137. A very good illustration of the extent to which the courts will go in construing the words of a covenant so as to carry out the real intent of the parties, is to be found in *Jowett v. Spencer*, 1 Exchq. 648. In that case, an action of covenant was brought upon an indenture, by which the plaintiff granted to the defendant all the coals and mines of coal under certain land. The defendant covenanted to pay the plaintiff £40 for every statute acre of the coal which should be *found* under the lands referred to in the lease until the said price should be fully paid, and to pay the plaintiff £40, part of the price, each year, by two equal half-yearly payments, whether the whole of an acre of the coal should be gotten each year or not. The plaintiff averred that at the time of the making of the indenture *there were* under the said lands fourteen acres of coal, and that thirteen acres of coal still remained under the said land, and the plaintiff claimed to recover £40 for two half-yearly payments. The defence insisted that the *finding* of coal upon the land was a condition precedent to a right of recovery, and that, as the plaintiff had not averred that any coal was *found* no recovery could be had, and the court of Exchequer sustained this view and gave judgment for the defendant. See *Jowett v. Spencer*, 15 M. & W. 662. But this judgment was reversed at Exchequer Chamber, which held that the *finding* of coal was not a condition precedent

to the plaintiff's right to recover. LORD DENMAN, C. J., in passing upon this question, said:—"The question is whether the *finding* of coal is a condition precedent to the plaintiff's recovering the annual sum of £40. It appears to us that it is not. The parties seem to have assumed, that there were coals within and under the premises, and the indenture operates as an absolute sale and conveyance of that coal to the defendant, but without any covenant on his part to work or get that coal. The words of the conveying part are, 'all the coals lying and being within and under the premises.' Whether the defendant at any time think fit to find and get them, was left entirely to his will and pleasure. The consideration money is £40 per acre for coals *found*, not for coals *gotten*. By the word 'found' we apprehend the parties to mean, '*ascertained to lie and be.*' It is necessary that the quantity should be ascertained at some time, in order to fix the ultimate amount of the consideration money. That quantity might be found and ascertained without working or getting the coal. Who, then, is the proper person to find and ascertain the quantity? Not the plaintiff, for he had parted with all his interest in and possession of the coal, but the defendant, who has taken them. In order to secure his so finding and ascertaining the quantity, the covenant of the defendant to pay £40 per annum till the consideration money should be fully paid is inserted, otherwise, as there is no covenant to work or get the coal, the quantity might never be ascertained. The right of the plaintiff to sue for the annual sum is absolute and without condition, and if, by finding and ascertaining the quantity of the coal, and paying the annual sum stipulated, the defendant has fully paid the consideration money for the purchase of the coal, it is for him to plead those facts. We think, then, that the plaintiff is entitled to keep his verdict, and the judgment of the court below should be reversed."

forfeiture.¹ Express covenants are construed more strictly than implied,² and if the covenant is between several persons, the language is to be applied to the one to whom it evidently belongs.³ DR. PALEY, in his work on Moral Philosophy, very succinctly states the rule in ethics for the construction of agreements as follows:—"Where," says he, "the terms of a promise admit of more senses than one, the promise is to be performed in that sense in which the promisor apprehended at the time that the promisee received it."⁴ He adds: "It is not the sense in which the promisor actually intended it that always governs the interpretation of an equivocal promise, because, at that rate, you might excite expectations which you never meant nor would be obliged to satisfy. Much less is it the sense in which the promisee actually received the promise; for, according to that rule, you might be drawn into engagements that you never designed to undertake. It must, therefore, be the sense in which the promisor *believed* that the promisee accepted the promise." This rule, subject to the exception that the contract when reduced to writing cannot be altered or varied by parol evidence, so far as the intention of the parties can be gathered from the language used, is, says MR. CHITTY,⁵ also the rule of law.⁶ LORD ELLENBOROUGH says:⁷ "The same sense is to be put

¹ Presbyterian Church v. Pickett, Wright (Ohio) 57.

² Shubrick v. Salmond, 3 Burr. 1639.

³ Randel v. Canal Co., 1 Harr. (Del.) 154. And the intention of the parties is to be ascertained *ex antecedibus et consequentibus* rather than from particular expressions, or the general structure of the instrument, or the order of arrangement in which the covenants appear. Hopkins v. Young, 11 Mass. 304; Goodwin v. Lynn, 4 Wash. (U. S.) 714; Speake v. Sheppard, 6 H. & J. (Md.) 85; Davis v. Lyman, 6 Conn. 249; Westcott v. Thompson, 18 N. Y. 366.

⁴ To this extent the rule is almost literally adopted in Gunnison, v. Bancroft, 11 Vt. 493.

⁵ Chitty on Contracts, 75.

⁶ Most systems of jurisprudence have manifested a decided preference for written over verbal contracts. The French civil law requires nearly all species of contracts to be in writing, and expressly prohibits the admission of oral evidence against the contents of a written contract. Pothier's Obligations, No. 785. And it is a fundamental rule of the common law, that oral evidence shall not be permitted to alter or vary the terms of a written instrument of any description; upon the principal that a writing, whether a specialty or a simple contract, stands higher in the scale of evidence than oral testimony, and that the stronger evidence ought not to be controlled by the weaker. In obedience to this rule, it is held that an oral agreement entered

upon the words of a contract in an instrument not under seal as would be put upon the same words in an instrument under seal, for the same intention must be collected from the same words of a contract in writing, whether with or without a seal."¹ The object, in the interpretation of contracts, is to arrive at the real intention of the parties, whatever may be the nature of the instrument;² and, if necessary, after all other rules fail, punctuation will be resorted to,³ the grammatical sense will be repudiated,⁴ words and sentences will be transposed,⁵ and when unavoidably necessary to give effect to the instrument a repugnant or meaningless clause will

into before or *at the time* of the signing of a written agreement for a lease, cannot be given in evidence, to change, qualify, or vary any of the provisions of the writing; as, to show that the rent was to be less, or was agreed to be paid at a different time. *Henson v. Coope*, 8 Scott, N. R. 48. Nor is parol evidence admissible to add to or detract from the terms of a written lease; as, to show that the tenant agreed to pay the ground rent, *Preston v. Merceau*, 2 W. Bl. 1249, or taxes, *Rich v. Jackson*, 4 B. & C. C. 515; or that more land was agreed to be included than that described, *Meres v. Ansell*, 1 Wils. 175; *Henson v. Coope*, ante; *Dickson v. Zizina*, 10 L. J. C. P. 71, or, indeed, any contemporaneous parol agreement that goes against the written contract, because the writing is treated as merging all prior agreements relating to the matter, and if anything was left to rest in parol it is the folly of the parties, *Kain v. Ald.*, 4 D. & R. 61, and, unless equity will reform the contract, it will be enforced according to the intention of the parties as evidenced by the usual sense in which the words used are employed. But a contract may be evidenced by several writings, as well as by one, provided it is shown that they relate to the same transaction and it does not appear that one was intended to entirely supersede the other. *Brown v. Langley*, 5 Scott, N. R. 48. As to how for parol evidence is admissible to explain a deed, see *post* p.

¹ *Seddon v. Senate*, 12 East, 78.

² *Wadlington v. Hill*, 18 Miss. 560; *Winnipiseogee Co. v. Perley*, 47 N. H. 88; *Peyton v. Ayres*, 1 Md. Ch. 64; *Chouteau v. Suydam*, 21 N. Y. 179; *Benedict v. Gaylord*, 11 Conn. 333; *Mulford v. Le France*, 26 Cal. 88; *Mills v. Catlin*, 23 Vt. 98; *Pike v. Monroe*, 36 Me. 309; *Deering v. Long Wharf*, 25 id. 51; *Wallis v. Wallis*, 4 Mass. 135; *Bryan v. Brady*, 16 Conn. 474.

³ *Ewing v. Burnett*, 11 Pet. (U. S.) 41.

⁴ *Jackson v. Topping*, 1 Wend. (N. Y.) 388; *Hancock v. Watson*, ante.

⁵ But not unless there is that in the deed or instrument which shows that to read the instrument as it would defeat the intention of the parties, and that by doing so the instrument will be rendered effectual in the manner intended by the parties. *Kew v. Robinson*, 5 Ired. (N. C.) Eq. 378. "Too much regard," says WILLES, C. J., in *Parkhurst v. Smith*, Willes, 333, "is not to be had to the natural and proper signification of words and sentences to prevent the simple intention of the parties from taking effect; for the law is not nice in grants, and therefore it doth often transpose words contrary to their order to bring them to the intent of the parties; for neither false Latin nor false English will make a deed void if the intent of the parties doth plainly appear." LORD COKE, in *Co. Litt.* 217 b, says: "If a lease for two years be made in February, ren-

be rejected.¹ If covenants refer to, or are dependent upon each other they will be construed together, and every part will be given effect if possible, and every word will be made to operate so as, if it can be done, to effectuate the intention of the parties.² If, however, the covenants are independent, they must be construed by themselves;³ but, even in construing such covenants, the other covenants will be examined to ascertain the true intention of the parties.⁴ If two or more instruments are executed at the same time, between the same parties, relating to the same subject-matter, they will be read and construed together as forming but one instrument;⁵ and the general purpose of both instruments will be carried into effect.⁶ So another instrument, executed at a prior date and between different parties, may be incorporated as a part of an instrument, either by a general or special reference thereto, either for a general or special purpose, and to the extent warranted by the reference, and the intent of the parties evinced thereby will become operative in construing such instrument.⁷ So, too, when it becomes necessary to do so, in order to arrive at the intention of the parties the court will take into consideration the cir-

dering certain rent payable at Michaelmas-day and Lady's-day during the term, the law will make a transposition of the feasts, viz., at Lady's-day and Michaelmas-day, that the rent may be paid yearly during the term, and so it is in the case of an annuity."

¹ *Alton v. Transportation Co.*, 12 Ill. 38. The rule may be said to be that, when two clauses in an instrument are so repugnant that they cannot stand together, one will be retained and the other rejected, according as the evident intent of the parties require; but if possible, they should be reconciled. *Daniel v. Veal*, 32 Ga. 589; *Petty v. Boothe*, 19 Ala. 633; *Eldridge v. Se. Yup. Co.*, 17 Cal. 44; *Corbin v. Healey*, 20 Pick. (Mass.) 514. The general rule in the construction of deeds is, to retain the first and reject the last clause, but this is not inconsistent with the one stated, because it is not the order in which the clause appears in the

deed that determines its precedence, *but the order in which it ought to appear* in whatever part of the instrument it may be found. *Doe v. Porter*, 8 Ark. 18. Thus, if by an inartificial writing of the deed the premises were made to follow the habendum, if the two are inconsistent, the habendum must yield to the premises. *Eldridge v. Se. Yup. Co.*, ante.

² *Richardson v. Palmer*, 38 N. H. 212; *Moore v. Griffin*, 22 Me. 350.

³ *James v. Emery*, 8 Taunt. 245.

⁴ *Goodyear v. Cary*, 4 Blatchf. (U. S. C. C.) 271.

⁵ *Cornell v. Todd*, 2 Den. (N. Y.) 180; *King v. King*, 7 Mass. 486; *Cloges v. Sweetzer*, 4 Cush. (Mass.) 408.

⁶ *Ford v. Belmont*, 7 Robt. (N. Y.) 97.

⁷ *Gammon v. Freeman*, 31 Me. 243; *Field v. Huston*, 20 Me. 69; *Ritter v. Barrett*, 4 Dev. & B. (N. C.) L. 133; *Doe v. Bernard*, 15 Miss. 319.

cumstances attending the transaction and the particular situation of the parties and the state of the thing granted at the time when the lease was made.¹ The construction of a covenant must be reasonable,² liberal,³ and favorable to the support of the covenant;⁴ and the whole instrument is to be considered in endeavoring to collect the intention of the parties, although *the immediate object of inquiry be the meaning of an isolated clause, agreeably to the maxim ex antecedibus et consequentibus fit optima interpretatio.*⁵ Where the lessee reserves an option to

¹ Winnipiseogee Co. v. Perley, ante; French v. Carhart, 1 N. Y. 96; Doe v. Burt, 1 T. R. 703; Doe v. Hubbard, 20 L. J. Q. B. 67; Press v. Parker, 10 Moore, 158; Mulford v. LeFrance, 26 Cal. 88; Hodden v. Shouty, 15 Ill. 581; Shore v. Wilson, 9 Cl. & F. 555; Dunn v. English, 23 N. J. L. 126; Adams v. Frothingham, 8 Mass. 352; Canal Co. v. Matthieson, 14 N. J. L. 385; Abbott v. Abbott, 53 Me. 356; Bradford v. Cressey, 45 id. 9. But if the intent is clearly expressed by the terms of the covenant, extraneous circumstances or facts are not admissible to alter or change it. Means v. Church, 8 W. & S. (Penn.) 303; Hutchings v. Dixon, 11 Md. 29; Dunn v. Bank of Mobile, 2 Ala. 152. In Williams v. Glover, 66 Ala. 189, under a written lease of a tract of land situated on an island in the Tennessee river, they were described as "all the lands on the island owned by the said" lessor with a specified exception, "said lands to be hereafter measured, to ascertain the amount of the same;" the rent reserved being "eight per cent. *per annum* on the value of said lands, estimated at \$35 per acre;" held that the rent was to be estimated on the number of acres in the entire tract, and was not limited to the cultivable portion, but that the road-bed and right of way of a railroad company, acquired by it prior to the lease, should be deducted. In the construction of a written lease, with the view of determining whether the rent per acre reserved was to be estimated on the entire tract, or on the cultivable portion only, it is not permissible that another person had

offered the stipulated price estimated on the entire tract.

² Hartshorne v. Watson, 4 Bing. N. C. 717. In Jones v. Shears, 7 C. & P. 346.

³ The terms used should prevail according to their most comprehensive and popular sense, unless there is something to restrain or limit their signification, Hawes v. Smith, 13 Me. 429; Robertson v. French, 4 East, 185, according to their reasonable sense in view of the circumstances and the subject-matter to which they relate, Easterly v. Heilbron, 1 McMull. (S. C.) 463; Ernst v. Bartle, 1 John. (N. Y.) Cas. 319, and that which is obviously most just. Holloway v. Lacy, 4 Humph. (Tenn.) 468.

⁴ Hallowell v. Morell, 1 Scott, N. R. 109; Goodtitle v. Bailey, Camp. 600. By the French Civil Code, Book 3, tit. 165, art. 1,157, it is provided that "When a clause is susceptible of two meanings, it must rather be understood in that according to which it may have some effect than in that whereby it cannot produce any."

⁵ Knower v. Emerson, 9 Pick. (Mass.) 422; Gray v. Clark, 11 Vt. 543; Morey v. Homan, 10 Vt. 567. In French Civil Code, Book 3, Tit. 8, § 5, art. 1,161, it is said "*all the clauses of agreement are interpreted by each other, giving to each the sense derived from the entire act.*" See also, Barton v. Fitzgerald, 15 East, 514; Trenchard v. Hoskins, Winch. 93. It is upon this principle that the recital in a deed or lease may be considered in order that the meaning of the parties may be ascertained, and that the matter of a subsequent distinct clause may often be ex-

himself, in the absence of any restriction thereon, he may

plained or qualified by the matter recited, *Payler v. Homersham*, 4 M. & S. 423; *Simons v. Johnson*, 3 B. & Ad. 175; *Lamper v. Cooke*, 5 B. & Ald. 606; *Hassel v. Long*, 2 M. & S. 369; and in such cases, parol evidence is admissible to explain the recital. *Simons v. Johnson*, ante. Even where there is no recital, a general covenant may sometimes be qualified or restricted as to the subject-matter by a subsequent special provision. Thus, in *Sicklemore v. Thistleton*, 6 M. & S. 9, a lease was granted by the plaintiff to J S, and the defendant was a party thereto. J S covenanted generally to pay the rent, and there was a general covenant by the defendant that J S should pay the rent *on the respective days*, and that he should perform the other covenants; and that in case J S should not pay the rent *for forty days*, defendant would pay it *on demand*. The court held that the defendant was not liable, until after a default by J S for forty days; for that the preceding general covenant by defendant was *qualified* by the latter stipulation, which they thought was introduced for his ease and protection: the covenants of the defendant, though several in point of fact, not being so in point of obligation. So, in *Edwards v. Rees*, 7 C. & P. 240, where A demised a colliery to B, and B covenanted to pay as rent "one-third part of the money that should arise, be made, received, or produced from the sale of the coals," and also covenanted to keep "true accounts of all coal daily raised, and to make and deliver true copies thereof to A," it was held, that taking the two covenants together, the rent was to be calculated on the amount of coals *sold*, and not on the amount of money *actually received*. It follows that even matter put only by way of *recital* in an instrument may amount to an agreement, where such recital is to be called into action to discover and give effect to the obvious meaning of the parties; provided it is plain, from the whole tenor of the instrument, that the parties mutually contemplated and intended that

the matter or act should be performed. Thus, in *Sampson v. Easterby*, 9 B. & C. 505, where a lease of an undivided third part of certain mines contained a *recital of an agreement* made by the lessee with the lessor, and the owner of the other two-thirds, for pulling down an old smelting mill, *and building* another of larger dimensions, and the lease contained a covenant to keep such new mill in repair, and so leave it at the expiration of the term, but did not contain a covenant to *build* it; it was held that such covenant was to be implied, but that the lessor of the one-third might maintain an action of covenant upon it, in respect of his interest. So words by way of *exception* may, for the same reason, constitute a covenant or agreement. LORD GIFFORD, in *Saltoun v. Houston*, 1 Bing. 483. Thus, a covenant in a lease to plough, cultivate, &c., the premises demised, "except the rabbit-warren and sheep-walk," amounts to a stipulation not to plough the rabbit-warren and sheep-walk, and covenant lies for so doing. *Duke of St. Albans v. Ellis*, 16 East, 352. And a covenant or agreement may arise even from words put in a clause, introduced as a *proviso* or *condition*; if there be sufficient to show that the parties contemplated an agreement that the particular act mentioned in the clause should be done. *Beswich v. Swindell*, 3 Ad. & El. 868. Thus, if a lessee covenant to repair, "provided always, *and it is agreed* that the lessor shall find timber, &c." the lessor is liable to an action of covenant if he refuse to find it; and the clause is not a mere qualification of the lessee's covenant. *Halder v. Taylor*, Brownl. 23; *Pordage v. Cole*, T. Raym., 183. So, where a lease was granted to A, *on condition that he should keep and leave* the premises in as good plight as he found them; it was decided he was liable in covenant for omitting to leave the premises in good plight; for such an agreement was to be implied. 40 Ed. 3, 5 b; *Bac. Ab. Covenant (A)*; *Rol. Ad.* 518; *Geery v. Reason*, Cro. Car. 128. But

exercise it capriciously, wilfully, and with the single

if the lessee of a term assign it by indenture, sealed by the assignee, and thereby assign *subject to the rent reserved by the lease, and the covenants therein*," the latter cannot merely by force of these words be sued by the lessee *in covenant* for not paying the rent to the lessor. *Wolveridge v. Steward*, 1 C. & M. 644, in error; 9 Bing. 60. When case lies, see *Burnett v. Lynch*, 5 B. & C. 589. Assumpsit does not lie if the assignment contains the word "grant," on which *covenant* might be brought. *Baber v. Harris*, 1 P. & D. 860. The general mode of construing deeds to which there are *exceptions*, is to let the exceptions control the instrument, so far as the words of it extend, and no farther; and then upon the case being taken out of the letter of the exception, the deed operates in full force. LORD KENYON, in *Bowring v. Emslie*, cited in 7 T. R. 216, n. Although, in the construction of all instruments, it is the duty of the court not to confine itself to the force of a particular expression, but to collect the intention from the whole instrument taken together, yet the judges are not authorized to deviate from the force of a particular expression, unless they find in other parts of the instrument expressions which *manifest* that the author of the instrument could not have the intention which the literal force of a particular expression may impute to him. However capricious may be the intention which is clearly and unequivocally expressed, every court is bound by it, unless it be *plainly* controlled by other parts of the instrument. *Hume v. Rundell*, 1 S. & S. 177. An express particular covenant will qualify the generality of a covenant in law, or implied covenant; as in the case of the words *demise and grant* in a lease, followed by a covenant by the lessor for quiet enjoyment, against his own act, or the acts of others claiming under him. *Merrill v. Frame*, 4 Taunt. 329; *Line v. Stephenson*, 5 Bing. N. C. 183. A covenant was entered into by the assignor of certain shares in a

patent right, that he had good right, full power, and lawful authority to assign and convey the said shares, and that he had not by any means directly or indirectly forfeited any right or authority he ever had or might have had over the same. It was held, that the generality of the former words of the covenant was not restrained by the latter. *Hesse v. Stevenson*, 8 B. & P. 565. LORD ALVANLEY, C. J., in delivering the judgment of the court, said: "From all the cases upon this subject it appears to be determined, that, however general the words of a covenant may be if standing alone, yet if free from other covenants, on the same deed it is *plainly and irresistibly* to be inferred that the party could not have intended to have used the words in the general sense which they import, the court will limit the operation of the general words. The question, therefore, always has been, whether such *irresistible* inference does arise; for if such an inference does arise from concomitant covenants, they will control the general words of an independent covenant in the same deed." The case of *Barton v. Fitzgerald*, 15 East, 530, is a strong authority that where neither the recital, nor the other covenants in a deed, evince a clear intention to restrict the plain general words of an independent clause, that clause shall receive its exclusive, unrestricted, and absolute meaning. In that case, the assignor in a deed of assignment of a lease (after reciting the original lease granted to another *for the term of ten years*, which by *mesne* assignments had vested in him, and that the plaintiff had contracted for the absolute purchase of the premises), bargained, sold, assigned, transferred, and set over the same to the plaintiff, for and during all the rest, &c., of the said term of ten years, in as ample a manner as the assignor might have held the same, subject to the payment of rent and performance of covenants; and then covenanted that it was a *good and subsisting lease, valid in law, of and for the said premises thereby*

purpose of incommoding or injuring the tenant, without incurring any liability to the lessee therefor. Thus, if A, in a lease to B, covenants that B shall have the "use of a" certain "pump in the yard, jointly with himself, *whilst the same shall remain there*, paying half the expenses of repairs," the covenant does not bind A to maintain the pump, or permit it to remain in the yard for any particular time, and the covenant is not broken even though he removes it without cause, and for the purpose of incommoding or injuring the lessee.¹ But a distinction exists, and was made in the case cited in reference to the pump between a case where the covenant relates to a thing demised, and one where there is no demise of the thing to which the covenant applies. In the former case, the demise of the *use* of a thing is treated as equivalent to a demise of the thing itself.² But except for the qualification of the covenant by the use of the words "*whilst it shall remain there*," which left it optional with the lessor to permit it to remain or not, it would, in the latter case, have been treated as a covenant that the pump

assigned, and not forfeited, &c., or otherwise determined, or become void or voidable. It was held that the generality of the covenant for title, which was *supported by the recital* of the bargain for an absolute term of ten years, was not restrained by other covenants, which went only to provide for or against the acts of the assignor himself, or those who claimed under him; such as, 1st, a covenant against encumbrances, except an underlease of part by the assignor for three years; 2dly, for quiet enjoyment; 3dly, for further assurance. And therefore, as it appeared that the original lease was for ten years, determinable on a life in being, which dropped *before* the ten years expired, though not until after the covenant of the assignor; the court held that the assignee might assign a breach upon the absolute covenant for title. See also, *Nind v. Marshall*, 3 Moore, 708, where a covenant for quiet enjoyment was against "the lessor, his executors, &c., or *any other persons whatsoever*." But

this was followed by another covenant for further assurance by the "lessor, his executors, &c., and *all persons claiming any estate therein under him or them*," and it was held that, looking at the whole deed, the covenant for quiet enjoyment extended only to the acts of the covenantor and of those claiming under him, and not against the acts of all the world. The court said that looking at the restrictive nature of the covenants preceding and following, the covenant for quiet enjoyment must have been intended to be subject to the same restrictions.

¹ *Rhodes v. Bullard*, 7 East, 116. So in *Butt v. Imperial Gas Co.*, L. R. 2 Ch. 158, the lessor reserved the right to divert a certain road, by making certain other alterations, and it was held that he might divert the road without any reference to the question whether he was to be benefited by it or not, and although he made the alterations stipulated to be made for the sole purpose of diverting the road.

² *Pomfret v. Riccroft*, 1 Saund. 321.

should remain during the term, and that the lessee should have the use of the same by paying half the expenses of repair.¹ As illustrative of the rule that a covenant is to be construed according to the intention of the parties as ascertained from the language used and the subject-matter to which it applies, in a case where a lease granted a certain lot "with the fire-proof warehouse for the purpose of storing cotton therein," it appearing from the circumstances attending the execution of the lease that it was the intention of the parties to procure a fire-proof warehouse for that purpose, it was held that the recital as to the warehouse must be treated as a covenant on the part of the lessor that it was fire-proof.² But a covenant of that description is not treated as continuing, and if the warehouse was fire-proof *at the time when the lease was made*, the fact that it subsequently became otherwise from any cause would not operate as a breach of the covenant. This was well illustrated in a California case. In that case a lease was made of premises, describing them as "a certain lot of land, together with the improvements thereon, consisting

¹ See opinion of LE BLANC, J., in *Rhodes v. Bullard*, ante. In *Pomfret v. Riccroft*, ante, a lease was made of a certain piece of land "except the land on which the pump stands, &c.," but giving to the lessee in common with the other tenants the right to use the pump during his term of thirty-one years. The plaintiff claimed that by this exception and demise to him of the right in common to use the pump, the defendant impliedly covenanted to repair it, and for permitting it to go to decay he brought covenant. But the Court of Exchequer held that no such covenant could be implied, but that the plaintiff—the defendant having demised the use of the pump to him—might repair it himself, "*because where the use of a thing is granted, everything is granted by which the grantee may have and enjoy such use.*" See also *Liford's Case*, 11 Coke, 52 a, where this doctrine of implied grants is very fully and clearly set

forth; also *Lord Darcy v. Askwith*, Hob. 234.

² *Vaughn v. Mattock*, 28 Ark. 9. A covenant for quiet enjoyment is not to be construed as intended to protect the lessee against any or all disturbances, but only such as in law amounts to a disturbance. *Ryckman v. Gillis*, 57 N. Y. 68. In a covenant in a lease of certain factories, the lessee covenanted to keep the "factories" insured. It was held that the word "factories" was to be treated as embracing the fixed machinery used to operate them, and that the covenant should be construed as requiring the lessee to keep such machinery, as well as the buildings, insured. *Maheo v. Hardesty*, 8 Md. 479. As to covenants implied in leases, see *Lynch v. Onondaga Salt Co.*, 64 Barb. (N. Y.) 558. As to when a covenant for quiet enjoyment is treated as broken by the existence of a right of way, see *Bridge v. Pierson*, 66 Barb. (N. Y.) 514.

of a building known and designated by the name of Hotel de France," and it was held that this could only be construed as a covenant that such a building was upon the premises at the time when the lease was made, and not that it should remain there during the entire existence of the term.¹ In an Indiana case² the lease contained a covenant that the lessee should "seed" certain land "to clover each year," and it was held that this could not be construed as a covenant on the lessee's part that the seed should grow, but only that he should sow proper seed upon the land properly prepared to receive it, at the usual season. A covenant must be reasonably construed. Thus, a covenant for quiet enjoyment as "against the lessor, his heirs, executors, &c., or any person or persons whatever," is treated as a covenant merely against a disturbance in possession, either by the lessor or some person claiming by, under, or through him, and not as a covenant against an entry by a mere trespasser, and it is unreasonable to suppose from the language used that the parties intended to enter into any such covenant.³ So, where a lease was made of a lot of ground "with all the appurtenances" for four years, at a rental of \$22 a year, and the lessee agreed to return the premises at the end of the four years "with all the appurtenances;" it was held, that this could not be construed as a covenant on the lessee's part to rebuild any of the buildings thereon *accidentally* destroyed by fire, or other casualty not resulting from his negligent acts, as, in view of the language used, the rent paid, &c., it would be unreasonable to suppose that the parties intended that he should do so.⁴

¹ Branger v. Manciet, 30 Cal. 624.

² Walters v. Hutchins, 29 Ind. 136.

³ Branger v. Manciet, 30 Cal. 624.

⁴ Maggort v. Hansberger, 8 Leigh. (Va.) 532. Where a tenant entered into a covenant to re-deliver a steam saw mill, at the expiration of his term, in as good order as when it was leased to him, "unavoidable accidents and the usual wear and tear excepted," it was held that this could not be construed as a covenant to rebuild the mill in case

it was *accidentally* destroyed by fire, as that must be treated as among the accidents excepted against in the covenant. Howeth v. Aderson, 25 Texas, 557. Where, in a lease, several buildings were embraced and named, and the lessor covenanted "to repair said building," it was held that the covenant should be treated as applying to *all* the buildings, and not as merely relating to the one last named. Leavitt v. Fletcher, 10 Allen (Mass.) 119.

A covenant on the part of a lessor to build upon the leased premises, is held not to involve a covenant to re-build in case the building erected by him is destroyed by fire or other casualty. Having performed his covenant once, by erecting such a building as he covenanted to erect, his covenant is discharged; and even though the building is destroyed by fire the lessee remains liable for the rent.¹

If a party acts contrary to the *intention* of a covenant, he is guilty of a breach thereof; as, if he covenants to leave all the trees upon the land, he is treated as covenanting to leave them standing, and if he cuts them down and leaves them lying upon the land he is liable for a breach of the covenant;² or, if he covenants to leave a certain pump upon the premises, that is already put up and in use, his covenant is not kept by pulling out the pump and leaving it upon the land, &c. The court will look first to the covenant itself, and if there is any ambiguity, or if the intention of the parties is not entirely plain therefrom, they will look at the circumstances existing at the time when the lease was made, and the subject-matter to which it relates, to ascertain the real meaning and intention of the parties.³ If a covenant is merely negative or passive, some positive act must be done in order to constitute a breach; as, where a person covenants with another to permit him to do a certain act, and permission to do the act was never asked, there can be no breach, even though the covenantor has put him-

¹ In *Cowell v. Lumley*, 39 Cal. 151; the plaintiff leased certain premises to the defendant for the term of five years at a certain rental, and also covenanted to erect a building upon the premises, according to certain plans and specifications referred to, and the lessee covenanted to keep the building in repair. The building was erected according to the contract, and the defendant paid the rent for three years, but during the early part of the fourth year the building was destroyed by fire, and the defendant refused to pay any rent for the period after the

building was destroyed by fire insisting that impliedly the plaintiff must be treated as having covenanted to re-build in case of the destruction of the building erected by him under his covenant to build, and that having failed to do so, he was not entitled to recover for the rent of the premises. But the court held that the plaintiff's covenant was discharged by the erection of the building, and that the covenant to re-build could not be implied.

² *Comyn's Digest*, Tit. Covenant (E), 2.

³ *Vaughn v. Mattock*, 23 Ark. 2.

self in a position that he could not perform ; as, when A covenanted with B to permit B to sow clover amongst barley sown by A, and he sowed in the last year of his term without giving B notice, it was held a breach of the covenant.¹ Nor is a lessee liable for a breach occurring *before* the covenant was *in fact* executed, although the lease refers back to a time anterior to the alleged breach, as the commencement of the term, and although the covenantor was in possession as tenant when the alleged breach was committed. Thus, the defendant went into possession under an agreement for a lease, June 22d, 1842, but the lease was not executed until November following, but it recited the fact that the term commenced June 22d. Shortly after the defendant entered, and before the lease was executed, he commenced to pull down and make alterations in the buildings upon the premises. The lease contained certain covenants on the tenant's part to repair, of which his acts in pulling down and altering the premises were alleged as a breach, but the court held, that even though such acts constituted a breach, no recovery could be had upon the covenant, because the alleged breach was committed *before* the lease was executed.² But if a tenant goes into possession of premises under an agreement for a lease, and subsequently a lease is executed, by which he covenants to do certain things unless prevented by "inevitable accident," in an action for a breach of the covenant he cannot set up an inevitable accident occurring *before* the lease was made, although after his tenancy commenced, in defence thereto.³ Where the performance of a covenant is ren-

¹ Woodfall's L. & T. 110.

² Shaw v. Kay, 1 Exchq. 412 ; Steele v. Mart, 4 B. & C. 272 ; Bird v. Baker, 1 E. & E. 12.

³ In Jervis v. Tompkinson, 1 H. & N. 195, by an agreement in writing, dated Aug. 29th, 1851, made between the plaintiff and defendants, the plaintiff (amongst other things) covenanted with the defendants that he would, on or before the 25th day of March then next ensuing, grant and demise to the defendants the lower

mine of rock salt or salt rock within and under certain land of the plaintiff, at Witton-cum-Twambrookes, &c., with free liberty, power, and authority for the defendants, during the time thereafter mentioned, and pursuant to the covenants to be contained in the said lease, to get and take all such lower rock salt or salt rock as should be found within or under the said land, and to carry away and dispose of the same : To hold the same unto the defend-

dered impossible, either by the act of God or of the law,

ants, their executors, &c., from the 15th day of June then last past for the term of twenty-one years, at and under the several rents, and subject to the several covenants and provisos therein mentioned, which were in terms the same rents, covenants, and provisos as were contained in the lease afterwards granted in pursuance thereof. At the time of the execution of this agreement the defendants began to sink a shaft on a piece of land belonging to them, adjoining the lands mentioned in the agreement, for the purpose of getting the rock salt referred to in the agreement. The sinking of this shaft was, in September, 1851, discontinued in consequence of an influx of brine, which interrupted the progress of the work. The defendants thereupon began to sink a second shaft in another part of the same piece of land, which shortly afterwards, in the same month of September, was discontinued, from the like cause. From these shafts the defendants had intended to drive levels under their land to the plaintiff's mine of rock salt, and so to get the same. On the 16th day of November, 1851, a lease, pursuant to the agreement, and a counterpart, were executed and delivered by the plaintiff and defendants respectively.—The case set out the lease, which was for twenty-one years, from the 15th of June, 1851. The *reddendum* commenced with a reservation of a rent of 6*d.* per ton, and also in proportion, for a less quantity than a ton of rock salt, at any time during the continuance of the term, gotten from the mine; “to be paid half-yearly, on the 19th September and 15th March in each year, in respect of the rock salt which shall have been raised or gotten during the preceding half-year; the first of such payments to be made on such one of the said days as shall first and next happen after any rock salt shall have been raised or gotten from and out of the said mine.” Then followed the reservation (stated in the declaration) of 6*d.* per ton for any quantity gotten in a year, less than 1000

tons. The lease also contained the following covenant on the part of the defendants:—“And also shall and will, in case the said rock salt mine and premises hereby devised shall, during the continuance of the said term hereby granted, be in danger of failing, by any inevitable accident whatever, at their own proper costs and charges, use their utmost endeavors to protect the said rock salt mine and premises from injury or prejudice.” The proviso for cesser was as follows: “Provided also, and it is hereby further declared and agreed by and between the said parties to these presents, that in case the rock salt or salt rock within and under the said land, &c., shall, during the continuance of the said term hereby granted, fail by any inevitable accident, or if the mine of rock salt or salt rock hereby demised shall be worked out and exhausted at any time during the said term, then and in either of the said cases, upon payment of all rent due and arrears of rent in respect of the said mine and premises hereby demised, and on performance in all respects of all and every the covenants, conditions, and agreements herein contained, and on the part and behalf of the said R. Tompkinson, &c. (the defendants), to be observed, fulfilled, and performed, the said term of twenty-one years hereby granted, or the residue thereof then unexpired, shall cease and determine to all intents and purposes whatsoever, anything herein contained to the contrary in anywise notwithstanding.” In consequence of the influx of brine before mentioned the defendants have never in any manner worked the plaintiff's mine of rock salt demised by the said lease, nor raised or got any rock salt therefrom, nor driven through the rock salt under their own piece of land mentioned in the said lease, in order to work or get the demised mine. Neither have they paid any or any part of the several rents reserved by the said lease. In answer to questions left to the jury, they found that the defendants could not have worked the plaintiff's mine “by

performance is excused. Thus, in a Michigan case¹ the landlord covenanted to rebuild in case of the destruction of the building by fire. The City after the loss, but before preparation had been made to rebuild, passed an ordinance prohibiting the erection of wooden buildings. After the buildings were burned, the defendant, with reasonable dispatch went on and erected a brick building, and the tenant moved into a part of it, but, complaining that the new building was not put up within a suitable time. He brought an action against the landlord on the covenant. The court held that the action would not lie, as the covenant only required the landlord to rebuild such a structure as was originally leased, and that this being rendered impossible by the passage of the ordinance, the landlord was released from performance. COOLEY, J., said "Some stress is also laid upon the fact that the lease did not mention the material of which the old building was constructed. The court below sustained the action.

If this judgment is correct, then Cordes had placed himself under legal obligation not only to put up a new building of some more substantial material than wood, no matter how much greater might be the cost, and to turn it over to Miller for the term at the same rent, no

any reasonable application of labor, diligence, skill, money, or other means;" and that "they were prevented from working it by the influx of brine." The question for the opinion of the Court was, whether, under the circumstances stated, the defendants have a defence to their action under the proviso for cesser of the said lease, or under any other of the pleas. The verdict for the plaintiff was sustained, POLLOCK, C. B., saying: "The term unquestionably commenced, *in point of interest*, on the 16th Nov., 1852, though the duration of the term as to computation of time, was to be reckoned from the 25th of June, 1851. See *Wyburb v. Tuck*, 3 Keb. 207. To cause the proviso to operate, there must have been a failure by *inevitable accident after the 16th of Nov., 1852*, for the proviso

clearly refers to some *future* inevitable accident, and that, *during the continuance of the term*, which did not begin until that day whereas the accident which caused the failure of the salt, is found by the special case to have occurred *before* the date of the lease, but *after* the date of the agreement for a lease and the commencement of operations under that agreement, by the discovery of brine in such quantities as to prevent the getting the rock salt at all. If the lease had been executed when the agreement was, viz., on the 25th Aug., 1851, the influx of brine, which appears to have taken place after sinking the shaft in Sept., 1851, might have been, on the evidence, such an inevitable accident as to be within the proviso."

¹ *Cordes v. Miller*, 39 Mich. 581.

matter how much more the occupation might be worth. Moreover he would be obliged to reproduce the old building, as near as the change in the material would permit, and could not compel his lessee to accept a building differently planned, subdivided and arranged, even though it might be better and at least equally convenient. In other words, in the enforced change of material Cordes could not consult his own interest in making such modifications as the change would be likely to render important and desirable, but would be tied down to the plan and arrangement of a building which it might be well enough to reproduce in the old material, but which would never be chosen if the material were to be brick, stone or iron.

We cannot think this the fair construction of the lease. Cordes covenanted to rebuild, if destroyed by fire, the building he leased; but did not covenant that if not allowed to rebuild, he would put up another on the same plan, of more substantial and presumably more costly material. Had the exact contingency which has since happened been in the minds of the parties at the time, it is scarcely conceivable that the lessor would have consented to put up a brick building in place of the one leased, and to receive for it the same rent the wooden building brought him, when its probable rental value would be considerably greater, and its cost presumably more.

Had this been an agreement by a builder to rebuild the old building, it would scarcely be urged that the covenant would bind him to erect a new one differing from it so radically as would a brick or a stone structure from one of wood. Had Cordes been selling this land to Miller with a similar agreement respecting the building, it would be equally plain that the change in the law could not work a change in his contract so seriously increasing his responsibility. But in principle the cases suggested would not differ from this in the least. Cordes undertook for something which by a change in the law has become illegal; and his covenant has thereby been discharged.

SEC. 304. **Liability of the parties and their assigns.**—As to the extent to which a lessee or his assignee is liable in covenant there is a considerable difference.¹ The lessee has both a privity of contract and a privity of estate; and though he assigns, and thereby destroys the privity of estate, yet the privity of contract continues, and he is liable in covenant notwithstanding the assignment;² but

¹ Woodfall's L. & T. 111-122.

² A lessee cannot discharge his liability upon either the express or implied covenants in the lease, by assignment, *Flinn v. Callow*, 1 M. & G. 589; *Worthington v. McCann*, 19 Ohio St. 66; *Van Rensselaer v. Chadwick*, 24 Barb. (N. Y.) 833; *Broom v. Hore*, Cro. El. 638; *Wadham v. Marlow*, 8 East, 814 n.; *Marsh v. Brace*, Cro. Jac. 834; *Staines v. Morris*, 1 V. & B. 11; *Fifty Associates v. Howland*, 5 Cush. (Mass.) 214, and the lessee is not absolved from his liability upon an express covenant, even though the lessor assented to the assignment and has accepted rent from the assignee. *Lodge v. White*, 80 Ohio St. 569; 27 Am. Rep. 492; *Taylor v. De Bue*, 81 Ohio St. 468; *Sutliff v. Atwood*, 15 id. 194; 2 Platt on Leases, 355. While the lessee remains tenant, the lessor has his option to sue him for arrears of rent in debt, *Rushden's Case*, 1 Dy. 4 b; *Anon.*, 2 Dy. 247 b. pl. (77); *Sicklemore v. Simonds*, Cro. Eliz. 797, or covenant; *Fisher v. Ameers*, 1 B. & Gold. 20; *Sicklemore v. Simonds*, ante; but when the privity of estate is transferred, and the lessor has once accepted rent of the assignee, or otherwise assented to his tenancy, *Fisher v. Ameers*, ante; *Anon.*, 2 Dy. 247 b. pl. (77); *Walker's Case*, 8 Coke, 24 b; *Iremonger v. Newsam*, Latch, 260; *Marsh v. Brace*, Cro. Jac. 834; *March v. Brace*, 2 Bulstr. 151; *Arthur v. Vanderplank*, 7 Mod. 198; *Mills v. Auriol*, 1 H. Bl. 453; *Auriol v. Mills*, 4 T. R. 98; *Thomas v. Cooke*, 2 Stark. 408; *Wadham v. Marlow*, 8 East, 814 n., and not before, *Hassel's Executrix*, Lit. 53; *Auriol v. Mills*, 4 T. R. 94; *Whitway v. Pinsent*, Sty. 300. See *Anon.*, Dy. 247 b. pl. (77); *Marrow v. Turpin*, Cro. Eliz. 715, the right to maintain an action of debt against the lessee is determined;

the right to an action of covenant, however, survives the assignment; *Fisher v. Ameers*, 1 B. & Gold. 20; *Ventrice v. Goodcheape*, 1 Rol. Ab. 522 (N), pl. 1; cited, Cro. Jac. 809; *Countess of Devon v. Collyer*, 1 Rol. Ab. 522 (N); 1 Saund. 240; *Ashurst v. Mingay*, 2 Show. 132; *Parker v. Webb*, 8 Salk. 5; *Edwards v. Morgan*, 8 Lev. 233; *Overton v. Sydal*, Cro. Eliz. 555; *Arthur v. Vanderplank*, 7 Mod. 198; *Jodderell v. Towell*, Ca. temp. Hardw. 848; *Jenkins v. Hermitage*, Freem. 377; *Hornby v. Houlditch*, 1 T. R. 93 n.; *Mills v. Auriol*, 1 H. Bl. 448; *Auriol v. Mills*, 4 T. R. 94; *Stevenson v. Lombard*, 2 East, 575; *Staines v. Morris*, 1 V. & B. 11; *Burnett v. Lynch*, 5 B. & C. 589; *Manning v. Flight*, 8 B. & Ad. 211; *Thomas v. Cooke*, 2 Stark. 408; and the lessor may sue, at his election, either the lessee, or the assignee; *Barnard v. Godscall*, Cro. Jac. 809; *Varnis v. Goodcheape*, cited Cro. Jac. 309; *Bacheloure v. Gage*, W. Jo. 223; *Hornby v. Houlditch*, Andr. 40; *Walker's Case*, 8 Coke, 24 b; *Norton v. Acklane*, Cro. Car. 580; *Devereux v. Barlow*, 2 Saund. 181; *Burnett v. Lynch*, 5 B. & C. 589; the former, in covenant, on the personal privity of contract; the latter, either in debt on the privity of estate, *Walker's Case*, 8 Coke, 22 b, *argu*; *Mills v. Auriol*, 1 H. Bl. 445; *Stevenson v. Lombard*, 2 East, 575-9; *Curtis v. Spitty*, 1 Bing. N. C. 756, or in covenant, on the privity of contract in respect of estate. *Stevenson v. Lombard* 2 East, 575; *Staines v. Morris*, 1 V. & B. 8; *Burnett v. Lynch*, 5 B. & C. 589. And it is observable that the assignee cannot plead that the landlord on a previous occasion refused to accept him as tenant. *Devereux v. Barlow*, 2 Saund. 181; *Iremonger v. Newsam*, Latch, 260. The les-

the assignee comes in only in privity of estate, and is therefore liable to the lessor and his assigns for those breaches only which occur during the continuance of such privity of estate and before he assigns over.¹ But he continues liable to his immediate assignor, his executors or administrators, upon any express covenant by him in the deed of assignment, for payment of the rent and performance

see is also liable to an action of covenant at the suit of the grantee of the lessor's reversion, although he, the lessee, may have assigned over, and the grantee of the reversion may have accepted rent of the assignee of the term. *Thursby v. Plant*, 1 Saund. 286; *Nurstie v. Hall*, 1 Vent. 10; *Ashurst v. Min-gay*, 2 Show. 183; *Parker v. Webb*, 8 Salk. 5; *Twynam v. Pickard*, 2 B. & Ald. 105. These remarks, however, are applicable only to an express covenant for payment of rent; for, on an implied covenant arising on the reddendum, after an assignment by the lessee, and acceptance by the lessor of rent from the assignee, *Fisher v. Ameers*, 1 B. & Gold. 20; *Bacheloure v. Gage*, Cro. Car. 188, or other assent to his being tenant, *Wadham v. Marlow*, 8 East, 314 n., or, according to one authority, *Anon.*, 1 Sid. 447, pl. 9. And see *Staines v. Morris*, 1 V. & B. 8; *Bret v. Cumberland*, Cro. Jac. 523, after an assignment merely, neither debt nor covenant will lie against the lessee. *Fisher v. Ameers*, ante; *Bacheloure v. Gage*, ante; *Bret v. Cumberland*, sup.; *Anon.*, 1 Sid. 447, pl. 9. On all the other covenants contained in the lease, whether inherent or collateral, the lessee's liability continues during the term. *Bacheloure v. Gage*, ante; *Whitway v. Pinsent*, Sty. 800; *Barnard v. Godscall*, Cro. Jac. 309; 1 Rol. Ab. 523 (N), 1; *Ventrice v. Goodcheape*, 1 Rol. Ab. 522 (N), 1. The assignee becomes charged with those that run with the land; but this does not relieve the lessee; either may be sued at the option of the lessor. *Bacheloure v. Gage*, W. Jo. 223; *Bret v. Cumberland*, Cro. Jac. 521; *Barnard v. Godscall*, ante; *Norton v. Acklane*, Cro. Car. 580; *Hornby v. Houlditch*, Andr. 40, 44; *Burnett v. Lynch*, 5

B. & C. 589; *Walker's Case*, 8 Coke, 24 b; *Devereux v. Barlow*, 2 Saund. 181; *Boulton v. Canon*, Freem. K. B. 836. A right of action once accrued to the lessor against the lessee is not defeated by the expiration of the lease; *Kinlyside v. Thornton*, 2 W. Bl. 1,111; *Walker's Case*, 8 Coke, 23 b. And see *James v. Landon*, Cro. Eliz. 86; nor by the surrender by the lessor of his reversion (as if he be tenant for life) to a paramount reversioner; *Ognel's Case*, 4 Coke, 49 b; nor by the lessee's surrender of his term to the lessor, *Walker's Case*, 8 Coke, 23 b. And if the lessor in his declaration in covenant makes profert of the "said indenture," it is no variance if at the trial he produces the counterpart. *Pearse v. Morrice*, 8 B. & Ad. 396. The lessee in pleading to an action of debt for rent, an assignment by him, and acceptance by the lessor of rent from the assignee, need not aver that the lessor had notice of the assignment, the acceptance being considered of itself *prima facie* evidence that the assignee paid the rent in that capacity, and not as the lessee's agent. To avail himself of want of notice, the lessor must allege it. *March v. Brace*, 2 Bulstr. 151; *Marsh v. Brace*, Cro. Jac. 334; *Hassel's Executrix*, Lit. 53. The lessee's representatives, as executors, &c., are equally liable thereon, although the lessee assigned before his decease. *Bret v. Cumberland*, Cro. Jac. 552; *Eaton v. Jacques*, 2 Doug. 455; *Chancellor v. Poole*, 2 Doug. 764; *Orgill v. Kemshead*, 4 Taunt. 642; 1 Smith L. C. 47 (4th ed.).

¹ *Harley v. King*, 5 Tryw. 692; *Taylor v. Shum*, 1 B. & P. 21; *Le Keux v. Nash*, 2 Stra. 1222; *Odell v. Wake*, 1 Camp. 394; *Onslow v. Corrie*, 2 Madd. 880; *Paul v. Nurse*, 8 B. & C. 486; 1 Smith L.

of the covenants contained in the original lease.¹ A covenant may be divisible and follow the land ; wherefore an action of covenant will lie against an assignee of part of the thing demised.² If a covenant by two lessees is joint and several, it will bind the executors of the deceased lessee, although the whole term, interest and benefit survived to the other lessee.³ The assignee of a lease is subject to a covenant therein to pay taxes, and a subsequent assignment by him will not relieve him from a breach occurring during his occupancy.⁴

SEC. 305. When covenants are void or nugatory.—A covenant to do a thing which upon the face of it appears to be prejudicial to the public interest, or otherwise contrary to law, is absolutely void ;⁵ so is a covenant to do a thing which is impossible, if the impossibility exist at the time of making the covenant ; but not otherwise.⁶ Where a covenant is founded on a conveyance of an estate which proves to be void, and no estate passes, the covenant is void also : thus, where the conveyance was “a grant of so much of a term as should be unexpired at the death of A,” and there was a covenant for quiet enjoyment, and a bond for performance, the conveyance being void on account of the uncertainty of the time when the term was to commence and end, the covenants were adjudged to be void, as they depended on the estate :⁷ but although this is the case with respect to all dependent covenants, it

C. 47 ; Cole Ejec. 540. An assignee is bound in favor of the lessor by all of the lessee's covenants, and is presumed to know what they are, *Barroilhet v. Battelle*, 7 Cal. 450 ; *McMurphy v. Minat*, 4 N. H. 251 ; *Willison v. Watkins*, 3 Pet. (U. S.) 50 ; *Hintze v. Thomas*, 7 Md. 346, and this is the rule whether he comes in by contract or by operation of law, provided he stands in the relation of assignee. *Prettyman v. Wallston*, 34 Ill. 175 ; *Sutcliffe v. Atwood*, 15 Ohio St. 186 ; *D'Aquin v. Armont*, 14 La. An. 217.

¹ *Harris v. Goodwin*, 9 Dowl. 409 ; *Burnett v. Lynch*, 5 B. & C.

589 ; *Wolveridge v. Stewart*, 1 Cr. & Mee. 644,

² 1 Roll, 522, l. 5 ; *Jones*, 245 ; *Congham v. King*, Cro. Car. 221.

³ *Enys v. Donnithorne*, 2 Burr. 1190, 1197.

⁴ *State v. Martin*, 14 Lea (Tenn.) 92. See on general proposition that the assignee is liable upon covenants that run with the land, *Bedford v. Terhune*, 30 N. Y. 458 ; *Post v. Kearney*, 2 N. Y. 394.

⁵ 1 Smith L. C. 278-286 (4th ed.).

⁶ *Shep. Touch.* 163.

⁷ *Capenhurst v. Capenhurst*, Sir T. Raym. 27 ; *Hayne v. Maltby*, 3 T. R. 438 ; *Co. Lit.* 456.

is otherwise of covenants which are independent.¹ A covenant in a lease to repair, &c., *during the term*, does not take effect where the lessor does not execute the lease.² If a lease is made for the express purpose of the premises being used to boil oil and tar, contrary to the provisions of the statute, the lessor cannot sue on it for rent.³ A covenant not to replevy goods distrained until the rent is paid is void.⁴ A covenant with the lessor to indemnify the town or county against any paupers which the lessee may cause to be settled in it is valid.⁵ But it does not run with the land nor bind an assignee of the lessee.⁶

SEC. 306. *General rules as to covenants being real or personal.*—Covenants are either real or personal; the former are such as are annexed to an estate, or are to be performed on it, and are said to “run with the land,” so that he who has the one is subject to the other. In order to run with the land and bind the assignee it must respect the thing granted or demised, *and the covenant must concern the land or estate demised.*⁷ A grant of a mere privilege, as, of the right to draw water from a certain pond, is not a conveyance of land, consequently, a covenant respecting it does not run with the land and cannot be enforced by an assignee of the grantee.⁸ And, in order to run with the land, it must not only relate to the estate, *but there must also be a privity of estate between the contracting parties.*⁹ Therefore, where an estate was conveyed to a trustee in fee to the use of such person as W should appoint, and in default of appointment to the use of W,

¹ Northcote v. Underhill, 1 Salk. 199; 1 Ld. Raym. 880.

² Pitman v. Woodbury, 8 Exchq. 4; Linwood v. Squire, 5 Exchq. 284; Wheatley v. Boyd, 7 Exchq. 20; Swatman v. Ambler, 8 Exchq. 72; 23 L. J. Exchq. 81. Compare these cases with Hughes v. Clarke, 10 C. B. 905; Morgan v. Pike, 14 C. B. 478; Wood v. The Copper Miners' Co., 14 C. B. 428; 17 C. B. 594; Northampton Gas Co. v. Parnell, 15 C. B. 680; Bowers v. Croll, 6 E. & B. 255; Hew v. Greek, 3 H. & C. 391.

³ Gas Light Co. v. Turner, 5 Bing. N. C. 666; 6 id. 324.

⁴ 1 Inst. 145 b.

⁵ Walsh v. Fussell, 6 Bing. 163.

⁶ Mayor, &c., of Congleton v. Pattison, 10 East, 180.

⁷ Nesbit v. Nesbit, 1 C. & M. (N. C.) 824; Wheeler v. Schad, 7 Nev. 204.

⁸ Wheelock v. Thayer, 16 Pick. (Mass.) 68; Mitchell v. Warner, 5 Conn. 497.

⁹ Webb v. Russell, 8 T. R. 402; Tallman v. Coffin, 4 N. Y. 184; Columbia College v. Lynch, 47 How. Pr. (N. Y.) 273, but the covenantee may sue, although his assignee cannot. Stokes v. Russell, 3 T. R. 393; Co. Litt. 384 b.

in fee, and W covenanted in the same conveyance, for himself, his heirs and assigns, to pay a certain fee farm rent reserved out of the estate to the vendors, their heirs and assigns, it was held that the land was not bound in the hands of W's appointee by W's covenant, *for the appointee did not take the estate of W, to which his covenant was annexed, but took as if the original conveyance had been made to himself.*¹ The lessor's covenant to pay the tenant for improvements runs with the land, and the tenant may retain possession even against the lessors assigns, until he is paid therefor.² A covenant by the lessor of a mine, quarry, or pit, that neither he or his assigns shall sell any such articles as are produced from the mine, quarry, or pit, is personal and does not run with the land.³ But it has been held that a covenant, in a lease of a mill site, by the lessor, for himself and his assigns, with the lessee and his assigns, not to erect and put in operation a rival mill during the term, runs with the land, and passes by an assignment of the lease; and the assignee may, in his own name, sue the assignee of the reversion for a breach of it.⁴ A covenant in a lease of a ferry that the lessor shall, during the existence of the term, have the right to pass toll free, is a mere personal covenant.⁵ A covenant between the several owners of mills, drawing water from the same dam, as to the use of the water, does not run with the land, because of a lack of privity of estate between such owners, and is not binding upon a grantee or lessee of either of the owners.⁶ Nor does a covenant not to permit a mill to be erected on other premises than those demised,⁷ or to

¹ Roach v. Wadham, 6 East, 289.

² Ecke v. Fetzner, 65 Wis. 55.

³ Bower v. Marshall, 19 N. J. Eq. 537.

⁴ Norman v. Wells, 17 Wend. (N. Y.) 136.

⁵ Morse v. Garner, 1 Strob. (S. C.) 514.

⁶ Hurd v. Curtis, 19 Pick. (Mass.) 459.

⁷ Harsha v. Reid, 45 N. Y. 415. In Norcross v. James, 140 Mass. 188, a covenant not to allow a quarry, upon lands belonging to

the grantor adjoining those conveyed to the grantee, to be worked, was held not to run with the land. But the reason for the distinction between that class of covenants, and a covenant not to permit erections of a certain class to be made upon the land, is not well taken, and shows the absurdity of attempting to make nice technical distinctions, when the real basis of the doctrine is, that that class of covenants are void, because opposed to public policy, in that they

name an arbitrator to settle disputes,¹ or to pay a part of the expenses of a party wall.² A covenant is said to run with the land when either the liability to perform it, or the right to take advantage of it, passes to the assignee of the land. A covenant is said to run with the reversion when either the liability to perform it, or the right to take advantage of it, passes to the assignee of that reversion.³ A joint covenant with tenants in common does not run with the land or with the reversion.⁴ Covenants personal are such whereof some person in particular shall have the benefit, or whereby he shall be charged, as, when a man covenants to do any personal thing.⁵ If the lessor covenants to pay rent or repair; or if he grants to the lessee so many estovers as will repair, or as he shall burn within his house during the term, these covenants, as belonging to things appurtenant, go with the land, into whosoever hand it comes.⁶ A covenant which relates to something not in being at the time of the demise,⁷ or which is merely personal or collateral to

stifle business, and prevent healthful competition. See, holding that a covenant against making a certain class of erections upon other adjacent lands, run with the land. *Trustees, &c., v. Thacher*, 87 N. Y. 440; 41 Am. Rep. 385; *Trustees v. Lynch*, 70 N. Y. 449; 26 Am. Rep. 615; *Phenix Ins. Co. v. Continental Ins. Co.*, 90 N. Y. 122; *Robbins v. Webb*, 68 Ala. 398; *Trustees v. Cowen*, 4 Paige, Ch. (N. Y.) 510. So that all buildings erected on a lot shall be set back a certain distance from the street. *Winfield v. Henning*, 21 N. J. Eq. 198; or not to let or establish any more mill sites on the same stream, for a saw mill, *Norman v. Wells*, 7 Wend. (N. Y.) 136; or to keep a drain in repair, *Northfleet v. Cromwell*, 64 N. C. 1: run with the land. So a covenant to keep a mill dam in repair, *Fitch v. Johnson*, 104 Ill. 111. See, also, *Ratavia M'fg. Co. v. Newton Wagon Co.*, 91 Ill. 280; *Sterling Hydraulic Co. v. Williams*, 66 id. 393.

¹ *Gray v. Cuthbertson*, 4 Doug. 351.

² *Brown v. McKie*, 57 N. Y. 684; *Curtis v. White*, Clarke's Ch. (N.

Y.) 389; *Bluck v. Isham*, (Ind.) 7 Am. L. R. U. S. 8. But *contra*, and holding that such a covenant *does* run with the land, see *Burlock v. Peck*, 2 Duer (N. Y. Superior Ct.) 90; *Black v. Isham*, 28 Ind. 37; *Cole v. Hughes*, 54 N. Y. 444; 18 Am. Rep. 611; *Hart v. Lyon*, 90 N. Y. 663; *Gibson v. Holden*, 115 Ill. 199; 56 Am. Rep. 148; see also, involving the same principle, *Bell v. Bronson*, 17 Penn. St. 363; *Todd v. Stokes*, 10 id. 155; *Gilbert v. Drew*, 10 id. 219; *Davids v. Harris*, 9 id. 503; *Jay v. Boston Penny Savings Bank*, 115 Mass. 60; *Weld v. Nichols*, 17 Pick. (Mass.) 538; *Scott v. Millan*, 76 N. Y. 443.

³ 1 Smith L. C. 42 (4th ed.).

⁴ *Roach v. Wadham*, 6 East, 289; *Thompson v. Hakewill*, 19 C. B. N. S. 718.

⁵ *Bac. Abr. Tit. Covenant (E)*, 2, 5; *Shep. Touch.* 161.

⁶ *Martyn v. Clue*, 18 Q. B. 661.

⁷ *Doughty v. Bowman*, 11 Q. B. 444; 1 Smith L. C. 47 (4th ed.). Where the covenant relates to a thing not in *esse*, but to be done upon the land demised, the assignee is bound, if named; but if

the thing demised,—as to pay a sum of money in gross, to build *de novo*, or the like,—does not run with the land, and therefore assignees are not bound, even though they be expressly named.¹ Although a covenant to put fixtures into a building runs with the land, yet, as it relates to a thing not *in esse*, but to be done, an action will not lie in favor of the lessee against the lessor's assigns, the word "assigns" not being used, although it is expressly provided that the "heirs, executors, &c.," of the parties, shall be bound thereby.² A covenant by the lessor to purchase at the end of the term at a valuation, all improvements, &c., made by the lessee, will bind his executors or administrators in their representative capacity, but not as assignees of the reversion.³ If a man

not named, he is not bound. *Tallman v. Coffin*, 4 N. Y. 184. The rule laid down in *Spencer's Case*, 5 Coke, 16, is that generally adopted, and furnishes an accurate test by which to determine what covenants do, and what do not run with the land. It is there resolved—1st. When the covenant extends to a thing *in esse* parcel of the demise, the covenant runs with the land and binds the assignee, though not named therein. Otherwise, when it relates to a thing not in being at the time of the demise. 2d. Although the covenant extends to a thing not *in esse* at the time of the demise, yet the assignee shall be bound if named, *unless the thing to be done is merely collateral to the land and does not concern the thing demised*. 3d. In a lease of personal goods, as, sheep or other cattle, a covenant by the lessee for himself and his assigns *does not* bind the assignee. Where a lease embraces both real and personal estate, the covenants, as a covenant to surrender, does not, as to the personal property, run with the land. *Allen v. Culver*, 8 Den. (N. Y.) 284.

¹ *Spencer's Case*, 5 Coke, 16; 1 Smith L. C. 86 (2d Res.). A covenant to pay off a certain mortgage is personal, even though it is expressly stated in the lease or grant that the covenant shall run with the land, *Campbell v. Johnson*, 4 Dana (Ky.) 177, and the parties

cannot by contract make a personal, a *real* covenant. *Id.*

² In *Hansen v. Meyer*, 81 Ill. 321; 25 Am. Rep. 262, a lease like that stated above was executed, the lessor covenanting to put "counters and shelves" into the building, but the word "assigns" not being used, it was held that the lessor's assignee was not liable on the covenant, upon the principle stated in *Spencer's Case*, 5 Coke, 16 *a*. See also, *Gray v. Cuthbertson*, 2 Chitt. 482, where the lessor covenanted for himself, *but not for his assigns*, to take and pay for all trees and bushes planted by the lessee, growing at the end of the term, and the lessor's assignee was held not chargeable upon the covenant, although it was admitted that, if the word "assigns" had been used, liability would have existed.

³ *Gorton v. Gregory*, 3 B. & S. 90; but see *Coffin v. Tallman*, 8 N. Y. 465. A lease of a house and lot with a provision that the lessor, &c., should pay at the end of the term for buildings erected by the lessee, &c., and with leave to pull down the house, and erect buildings,—Held, not a building or repairing lease, but that it was at the option of the lessee to pull down the old house, or to make improvements, if any, without doing so; and that the covenant ran with the land, so that the executors of one who became assignee

leases animals, or anything personal, and the lessee covenants for himself and "his assigns" at the end of the term to deliver up the animals or things so let, or to pay such a price for them, if the lessee assigns, this covenant will not bind the assignee, for it is but a personal contract.¹ Covenants which run with the land bind those who come in by act of law, such as the personal representatives of the assignee of a lessee, as well as those who come in by act of the parties;² for the personal representatives of a lessee for years are his assignees.³ If a man covenants to pay money, build a house, for quiet enjoyment or the like, and he does not in the covenant mention his executors or administrators, yet hereby his executors and administrators are bound and shall be charged.⁴ In preparing covenants which are intended to run with the land, the "assigns" should always be mentioned, for though some covenants will bind them although not mentioned,⁵ and others will not bind them although mentioned,⁶ yet there is a middle class, in which assignees are bound if mentioned, but not otherwise,⁷ and it is prudent to provide for the possibility of a covenant being held to belong to this class.

SEC. 307. What covenants run with the land.—Where a covenant is for the benefit of the estate demised it runs with the land, and will extend to the assignee, though

of the term could sue for the breach. *Lametti v. Anderson*, 6 Cow. (N. Y.) 302. A covenant with the lessee, not naming his assigns, to purchase at the end of the term improvements made by him during the term, as it does not relate to anything upon the demised premises as parcel thereof, and in being at the time of the lease, and the assignee of the lessee not being named, does not run with the land so as to uphold an action by the assignee, *Coffin v. Tallman*, 8 N. Y. 465.

¹ *Spencer's Case*, *supra*.

² *Esp. N. P.* 290; *Prettyman v. Wallston*, 34 Ill. 175; *D'Aquin v. Armand*, 14 La. An. 217; *Sutcliffe v. Atwood*, 19 Ohio St. 186.

³ *Hornidge v. Wilson*, 11 Ad. & El. 645; *Wollaston v. Hakewill*,

8 M. & G. 297; *Hopwood v. Whalley*, 6 C. B. 744; 6 D. & L. 342; *Collins v. Crouch*, 13 Q. B. 542.

⁴ *Shep. Touch.* 178; *Williams v. Burrell*, 1 C. B. 402.

⁵ *Bac. Abr. Tit. Covenant (E)*, 8; *Cockson v. Cock*, Cro. Jac. 125; *Tatem v. Chaplin*, 2 H. Bl. 133; *Wilkinson v. Rogers*, 12 W. R. 119; *Martin v. Clue*, 18 Q. B. 661.

⁶ *Spencer's Case*, 5 Coke, 16, or even though it is specially provided that they shall run with the land. *Campbell v. Johnson*, 4 Dana (Ky.) 177.

⁷ *Spencer's Case*, *ante*; *Paul v. Nurse*, 8 B. & C. 486; *Doughty v. Bowman*, 11 Q. B. 444; *Greenaway v. Hart*, 14 C. B. 340; *Smith L. & T.* 392 (2d ed.).

he is not named: ' thus, a covenant to pay rent ' or taxes, or to repair, ' or to leave in repair, ' runs with the land, for it effects the estate in the hands of any person that has it; ' a covenant to pay for improvements put upon the land by the tenant runs with the land ' but it is otherwise as to a covenant to build and maintain a new fence on the land. ' But a covenant to maintain an *existing* fence, runs with the land; ' yet if a lessee for

¹ Lewis v. Cook, 13 Ired. (N. C.) 198; White v. Whitney, 8 Met. (Mass.) 81; Dickerson v. Holmes, 8 Gratt. (Va.) 353; Slater v. Rawson, 6 Met. (Mass.) 79; Shelton v. Codman, 8 Cush. (Mass.) 818; Markland v. Crump, 1 D. & B. (N. C.) 94; Martin v. Baker, 5 Blackf. (Ind.) 232; Allen v. Culver, 3 Den. (N. Y.) 384; Suydam v. Jones, 10 Wend. (N. Y.) 180, and a covenant so running with the land attaches to the land, although neither party had any interest therein when the covenant was made. Fuller v. Eastman, 8 Met. (Mass.) 121. And generally it may be said that an assignee of a lease is liable for the performance of every duty issuing out of the land or directly relating to it. Post v. Kearney, 2 N. Y. 394; Torrey v. Wallis, 3 Cush. (Mass.) 442; Graves v. Porter, 11 Barb. (N. Y.) 592; Bac. Abr. Tit. Covenant (E), 3; Spencer's Case, ante.

² Van Rensselaer v. Hays, 19 N. Y. 68; Van Rensselaer v. Bonesteel, 24 Barb. (N. Y.) 365; Main v. Feathers, 21 id. 646; Sandwith v. De Silver, 1 Browne, (Penn.) 221; Hurst v. Rodney, 1 Wash. (Va.) 375. But a covenant embodied in a lease that the lessee shall pay to a third person a pre-existing debt, due from both lessor and lessee jointly to a third person, does not run with the land. The covenant is merely collateral, and does not bind the assignee of the lease. Moreover the creditor being in no way connected with the reversion or rent, could not take advantage of such a covenant if it did run with the land. Dolph v. White, 13 N. Y. 296; Parker v. Webb, 8 Salk. 5.

³ Post v. Kearney, 2 N. Y. 394; Astor v. Miller, 2 Paige Ch. (N. Y.)

68; Dean and C. of Windsor's Case, 5 Coke, 24; Conan v. Kemise, W. Jon. 245; Smith v. Arnold, 8 Salk. 4; Minshull v. Oakes, 3 H. & N. 798; Martyn v. Clue, 18 Q. B. 661.

⁴ Vin. Abr. Covenant (K), 19; Strode v. Seaton, 2 C. M. & R. 730; 1 Smith L. C. 46; Martyn v. Clue, ante; Demorest v. Willard, 8 Cow. (N. Y.) 206; Myers v. Burns, 83 Barb. (N. Y.) 401; Shelby v. Hearne, 6 Yerg. (Tenn.) 512; Harris v. Goslin, 3 Harr. (Del.) 340; Payne v. Haine, 16 M. & W. 541.

⁵ Buckley v. Pirk, 1 Salk. 317; Wakefield v. Brown, 9 Q. B. 209; Magnay v. Edwards, 18 C. B. 479; 1 Smith L. C. 49 (4th ed.).

⁶ Ecke v. Fitze, 65 Wis. 55; Gorton v. Gregory, 3 B. & S. 90; Mansel v. Norton, L. R. 22 Ch. Div. 769; Hopkins v. Gilman, 22 Wis. 476; 47 id. 581.

⁷ Kennedy v. Owen, 136 Mass. 199.

⁸ Hartung v. Witte, 59 Wis. 285; Kellogg v. Robinson, 6 Vt. 276; Patton v. Deshon, 1 Gray (Mass.) 325; Howland v. Coffin, 12 Pick. (Mass.) 125; Plumleigh v. Cook, 13 Ill. 669; Bronson v. Coffin, 108 Mass. 165; Norman v. Wills, 17 Wend. (N. Y.) 176; Beddoe v. Wadsworth, 21 id. 120; Duffy v. R. R. Co. 2 Hilt (N. Y.) C. P.) 476; Brewer v. Marshall, 18 N. Y. Eq. 838; Van Rensselaer v. Hays, 19 N. Y. 81; Cook v. Brightly, 46 Penn. St. 345; Baldwin v. Walker, 21 Conn. 168; Hazlett v. Sinclair, 76 Ind. 488; Crawford v. Chapman, 17 Ohio, 445; see also holding that a covenant to fence "and keep fenced" runs with the land. Blaine v. Taylor, 19 Abb. (N. Y.) Tr. 228; Kellogg v. Robinson, ante; Bronson v. Coffin, ante.

years covenants for himself (omitting other words) to repair the house demised, it seems in this case he is bound to repair only during his life, and his executors or administrators are not bound.¹ A covenant for further assurance,² for a right of ingress and egress to and from a building,³ not to assign or underlet, runs with the land.⁴ In this country it has been held that a covenant not to erect a building in front of the demised premises runs with the land;⁵ but in England it is held that it does not.⁶ Where a lessee agreed to pay, in addition to the rent that had been reserved, ten per cent. on the outlay which the lessor should make in improving the buildings, it was held that this was not a contract running with the land.⁷ In England, it is held that a covenant to pay the rent will not run with the rent alone;⁸ but a contrary rule has been adopted in some of the States of this country, and such a covenant in a lease for life or years is held to run with the rent alone.⁹ A covenant not to plow or to cultivate the land in a certain manner runs with the land, and therefore binds an assignee, although "assigns" are not named in the deed:¹⁰ so a covenant to use the land in a husband-like manner, and leave it in like condition:¹¹ so a covenant

¹ Shep. Touch. 178.

² *Bennett v. Waller*, 28 Ill. 97; *Roe v. Haley*, 12 East, 464. A leased his farm to B, to explore for and produce oil at a royalty of one-eighth the production. The lease contained the following covenant: "To continue with due diligence and without delay, to prosecute the business to success or abandonment; and if successful, to prosecute the same without interruption, for the common benefit of the parties." B assigned an interest in said lease to C and D, and they with B assigned it to E. Two wells were bored in the farm, both of which were producing wells. E refused to bore any other wells. In an action of covenant brought by A against E for breach of the covenant above quoted, it was held that said covenant was not the personal covenant of B, but a covenant that run with the land, and therefore bound E.

Bradford Oil Co. v. Blair, 118 Penn. St. 88.

³ *Bush v. Calis*, 1 Shower, 889; *Cole's Case*, 1 Salk. 196.

⁴ *Williams v. Earle*, 9 B. & S. 740.

⁵ *Trustee v. Cowen*, 4 Paige Ch. (N. Y.) 516.

⁶ *Thomas v. Hayward*, L. R., 4 Exchq. 811.

⁷ *Lambert v. Norris*, 2 M. & W. 333; *Hoby v. Roebuck*, 7 Taunt. 157; *Donellan v. Read*, 8 B. & Ad. 899; *Martyn v. Clue*, ante.

⁸ *Randall v. Rigby*, 4 M. & W. 185.

⁹ *Patten v. Deshon*, 1 Gray (Mass.) 325; *Willard v. Tallman*, 2 Hill (N. Y.) 274; *Demorest v. Willard*, 8 Cow. (N. Y.) 208; *Wollan v. Harmstead*, 44 Pen. St. 492. But *contra*, *Allen v. Wooley*, 1 Blackf. (Ind.) 148.

¹⁰ *Cockson v. Cock*, Cro. Jac. 125.

¹¹ *Walsh v. Watson*, Ecp. N. P. 295.

to lay dung on the demised land in each and every year during the continuance of the term;¹ or a covenant to leave the land in a certain condition or with certain crops sown or planted;² but a covenant to pay rent and repair, made *with a mortgagor* and his assigns, in a lease granted by himself together with the mortgagee, does not run with the land, as it is only collateral to the grantor's interest in the land.³ A lease recited that the lessors were owners subject to a mortgage, the interest on which was payable at a certain place; it then demised the land for a term, the lessee yielding and paying a certain sum at that *place* in part of the interest due on the mortgage, and the lessee covenanted to pay that sum at the *place* and in the manner mentioned: held that this was a covenant in gross to pay an annual sum.⁴ A covenant that a lessee should reside on the demised premises during the term was held to extend to his assignees, though not mentioned in the covenant.⁵ So with respect to a covenant not to carry on particular trades,⁶ or erect other than buildings of a certain kind, or to use them for other than certain specified purposes,⁷ or a covenant to erect a building upon demised premises,⁸ or to erect and maintain a fence between adjoining lots,⁹ a covenant to insure when the covenant provides that the money received upon the policy shall, either wholly or in part, be expended in restoring the buildings.¹⁰ A covenant to pull down old buildings, or parts thereof, and build new,¹¹ or not to carry on an offensive trade upon the premises.¹² A covenant by a lessee of tithes for himself and his "assigns" not to let

¹ ——— v. Davis, MS. M. T. 42 Geo. 8.

² Hooper v. Clark, 8 B. & S. 150, sustains the proposition in principle.

³ Webb v. Russell, 8 T. R. 393; Stokes v. Russell, Id. 678; Russell v. Stokes, 1 H. Bl. 562.

⁴ Pargeter v. Harris, 7 Q. B. 708.

⁵ Tatem v. Chaplin, 2 H. Bl. 183.

⁶ Hunt v. Bishop, 8 Exch. 675; Barron v. Richards, 8 Edw. Ch. (N. Y.) 96.

⁷ St. Andrew's Church's Appeal, 67 Penn. St. 512.

⁸ Fisher v. Lewis, 1 Penn. L. J. 422.

⁹ Bronson v. Coffin, 108 Mass. 174; Duffy v. N. Y. & Erie R. R. Co., 2 Hilt. (N. Y. C. P.) 496; Kellogg v. Robinson, 6 Vt. 276.

¹⁰ Thomas v. Van Kapff, 6 G. & J. (Md.) 872.

¹¹ Harris v. Caulborn, 8 Harr. (Del.) 338.

¹² Barron v. Richards, 8 Edw. Ch. (N. Y.) 96.

any of the farmers in the parish have any part of the tithes, runs with the tithes, and binds the assignee.¹ A covenant to carry all the corn produced on the demised land to the lessor's mill to be ground, is a covenant which runs with the land, of which the assignee of the reversioner of the land demised and of the mill may take advantage; the suit to the mill being likened to rent, and the judgment of the court proceeding on the unity of the title to the mill and the land demised.² A covenant for quite enjoyment runs with the land;³ so does a covenant to produce title-deeds⁴ or to make further assurance,⁵ or or renew the lease.⁶ So a covenant by a lessee for lives, made in an underlease, that he will, on either of the *cestui que vies* dying, apply for and do his utmost endeavors to procure a renewal of the lease for another life, is a covenant which runs with the land, and therefore the assignee of the underlessee may sue on it.⁷ A covenant in an underlease, whereby the lessor covenanted (not naming his assigns) to observe and perform and effectually to indemnify the lessee against the covenants in the superior lease, one of which was to build several houses on the land, does not run with the land so as to make the assignee of the covenantor liable.⁸ A covenant to build a new smelting mill in lieu of an old one in a lease of mines, has been considered as a covenant which runs with the land, as it tended to the support and maintenance of the thing demised.⁹ A covenant to repair and leave in repair (*inter alia*) all buildings which should or

¹ Bally v. Wells, 3 Wils. 25; Brewer v. Hill, 2 Anst. 413.

² Vyvyan v. Arthur, 1 B. & C. 410, or that the grantor and his heirs may grind toll free. Dunbar v. Gumper, 2 Yeates (Penn.) 74.

³ Lewis v. Campbell, 8 Taunt. 715; 3 Moo. 35, 51; Campbell v. Lewis, 2 B. & Ald. 392; Noke v. Awder, Cro. Eliz. 375, 436; 1 Smith L. C. 46 (4th ed.); Suydam v. Jones, 10 Wend. (N. Y.) 186; Hunt v. Amidon, 4 Hill (N. Y.) 345; Martin v. Baker, 5 Blackf. (Ind.) Heath v. Whidden, 24 Me. 383; Markland v. Crump, 1 D. & B. (N. C.) L. 94.

⁴ Barclay v. Raine, 1 Sim. & S. 449.

⁵ Middlemore v. Goodhall, Cro. Car. 503; Kingdon v. Nottle, 4 M. & S. 58; King v. Jones, 5 Taunt. 418.

⁶ Isteed v. Stanley, 1 And. 82; Brooke v. Buckley, 3 Ves. Jr. 498; Roe v. Hayley, 12 East, 464.

⁷ Simpson v. Clayton, 4 Bing. N. C. 758.

⁸ Doughty v. Bowman, 11 Q. B. 444.

⁹ Sampson v. Easterby, 9 B. & C. 505; Easterby v. Sampson, 6 Bing. 644.

might be thereafter erected during the term on the demised premises, is not considered as a covenant absolutely to do a new thing, but to do something conditionally, viz., that if new buildings were erected on the demised premises during the term to repair them; and, as when built they would be part of the thing demised, the assignee of the lessee would be bound by the covenant although not named therein.¹ A covenant by a lessor to supply houses with good water, at a rate therein mentioned for each house, runs with the land; and for a breach of it the assignee of the lessee may maintain an action against the reversioner;² but a covenant by a lessor (not mentioning his assigns) to pay on a valuation for all trees planted by the lessee during the term, does not run with the land so as to bind an assignee of the reversion.³ A covenant by a lessor, for himself and his assigns, to purchase by appraisement at the end of the term all improvements, &c., made by the lessee, will not bind the assignees of the reversion.⁴ But a covenant *to pay* for all improvements made upon the premises demised runs with the land:⁵ so does a covenant to renew the lease,⁶ or that the lessee may purchase the land at his option during the term,⁷ as such a covenant for many purposes may be regarded as a continuation of the former term.⁸ The executors of the lessor should be charged upon such a covenant in their representative capacity and not as assignees of the reversion.⁹ Where there was an exception in a lease of an entry, and liberty to wash in the kitchen, and a passage for that purpose; it was held that an action would lie against an assignee for hindering the lessor, because a covenant relating

¹ *Minshull v. Oakes*, 2 H. & N. 798.

² *Jourdain v. Wilson*, 4 B. & Ald. 266.

³ *Grey v. Cuthbertson*, 4 Doug. 351; 2 Chit. 482; 1 Selw. N. P. 534 (12th ed.).

⁴ *Gorton v. Gregory*, 3 B. & S. 90; but see *Coffin v. Tallman*, ante.

⁵ *Lockett v. Howard*, 34 Md. 121.

⁶ *Wilkinson v. Pettitt*, 47 Barb. (N. C.) 290; *Piggot v. Mason*, 1

Paige Ch. (N. Y.) 412; *Barclay v. Steamboat Co.*, 6 Phila. (Penn.) 558; *Vernon v. Smith*, 5 B. & Ald. 11; *Hyde v. Skinner*, 2 P. Wms. 196; *Winslow v. Tighe*, 2 B. & B. 195; *Roe v. Hayley*, 13 East, 469.

⁷ *Hagar v. Buck*, 44 Vt. 285; *Napier v. Darlington*, 70 Penn. St. 64; *Willard v. Taylor*, 8 Wall. (U. S.) 557.

⁸ *Id.*

⁹ *Gorton v. Gregory*, *supra*.

to a way or other profit appurtenant goes with the tenement, and binds the assignee : ' but where in a lease of ground, with a liberty to make a watercourse and erect a mill, the lessee covenanted for himself, his executors and assigns, not to have persons to work in the mill who were settled in other parishes without a parish certificate, it was held that this covenant did not run with the land, nor bind the assignee of the lessee.' Where the lessee of a theatre by deed agreed to repay money lent to him by the plaintiff on a day certain, and that until payment the plaintiff and such persons as he might appoint should have the free use of two boxes in the theatre, no specific boxes being mentioned, and afterwards assigned his interest in the theatre, it was held that it was a mere personal contract, and that no action could be maintained against the assignee for refusing to permit the plaintiff to use the boxes.' A mere personal covenant in a lease is not affected by a surrender of the lease.' When a covenant is broken, it becomes mere personalty, and ceases to run with the land ; ' and, even though a covenant may run with the land, yet it does not so run against the clear intention of the grantor, or unless there is such language used as shows that it was intended to pass the benefit or burden. This was illustrated in a recent English case, ' in which the owners in fee of a residential estate to the plaintiff and adjoining lands sold part of the adjoining lands to the defendants' predecessor in title, who entered into covenant with the vendors and their assigns, restricting their right to build on and use the purchased land. The same vendors afterward sold the residential estate to the plaintiff's predecessor in title. The

¹ Cole's Case, 1 Show, 388 ; 1 Salk. 196.

² Mayor, &c., of Congleton v. Pattison, 10 East. 180 ; and see Walsh v. Fussell, 6 Bing. 163.

³ Flight v. Glossop, 2 Bing. N. C. 125.

⁴ Wilder v. Maine Centl. R. R. Co., 65 Me. 332 ; Atty. Gen. v. Cox, 8 H. L. Cas. 240.

⁵ Shelby v. Hearne, 6 Yerg. (Tenn.) 512. But in Maine by stat-

ute, and in Missouri, Dickson v. Desire, 23 Mo. 151 ; Indiana, Martin v. Baker, 5 Blackf. (Ind.) 282, and Ohio, Devone v. Sunderland, 17 Ohio, 52, as well as in England, Kingdon v. Nottle, 4 M. & S. 53, such covenants are treated as continuous, and pass with the land, though broken before assignment.

⁶ Renols v. Cowlinshaw. 41 L. T. N. S. 116.

conveyance contained no reference to the restrictive covenants, nor was there any contract or representation that the purchasers of the residential estate were to have the benefit of them. There was, moreover, in the plaintiff's conveyance a covenant limiting their use of the purchased property, but such covenant was not co-extensive with the covenants above mentioned. In an action by the plaintiffs to restrain the defendants, who had purchased the land first sold, as above mentioned, with notice of the first mentioned restrictive covenant, from building in contravention of those covenants, it was held, that although the plaintiffs were "assigns of the original covenanters, they were not entitled to sue upon the original covenants."¹ As there can be no covenant except the contract is under seal, it follows that no burden can be imposed upon the land except by contract under seal,² nor by a covenant entered into *after* the original lease or grant has been delivered;³ but, while such a covenant neither creates an easement nor runs with the land, yet it will be enforced in equity against a subsequent grantee with notice. So held, in a case where an agreement under seal was made, subsequent to a conveyance of a lot, that the purchaser would, within one year, build a residence upon such lot, to cost not less than a certain sum, and in a certain specified manner.⁴

SEC. 308. *Divisibility of liability on covenants.*—A covenant which runs with the land may be divisible and follow the land; therefore an action of covenant will lie against an assignee of part of the premises leased;⁵ thus, where two houses were leased, with a covenant on the part of

¹ See *Keates v. Lynch*, 20 L. T. N. S. 255; *Child v. Douglass*, 28 L. T. O. S. 140, 282.

² *Elliott v. Johnson*, 8 B. & S. 38.

³ *Kirkpatrick v. Peshine*, 24 N. J. Eq. 206.

⁴ *Id.*

⁵ When a covenant running with the land is divisible in its nature, and the entire interest in different parts of the land passes by assign-

ment, the assignee of each part will be exclusively liable for a breach which relates to that part alone. *Astor v. Miller*, 2 Paige Ch. (N. Y.) 68. Where, from the subject-matter of the covenant, it is the evident intent of the parties, that they should be taken distributively, they may be so taken, although there be no words of severalty. *Ludlow v. M'Crea*, 1 Wend. (N. Y.) 223; *Ernst v. Bar-*

the lessee for himself and his assigns to repair, and the lessee assigned one of them, in an action against such assignee for not repairing it was held to be maintainable; so in case of eviction the rent may be apportioned as in debt or replevin; so, it seems, an action lies by an assignee of part of the estate demised, or the assignees of several parts may join.* An assignee of five-sixths of an underlease, who is tenant in common with the assignee of the other sixth, may sue on a covenant by the original lessee to procure a renewal of the original lease.* The assignee of part of an estate is not liable for rent for the whole; but if a lessee grants or assigns part of his estate, yet the entire privity of the contract is not at an end, and the lessee would, it seems, remain liable on his covenant to pay the entire rent, for he cannot apportion it.*

SEC. 309. *Dependent or independent.*—General rule with respect to such covenants.—As to what covenants shall be construed to be conditions precedent or not, it is held that the dependence or independence of covenants must be collected from the sense and meaning of the parties; and that in whatever order covenants may stand in a deed, their precedency must depend on the order of time in which the intent of the transaction requires the per-

tle, 1 Johns. Cas. (N. Y.) 319; Walker v. Webber, 12 Me. 65; 1 Roll. 522, l. 5; Conan v. Kemise, W. Jon. 245; Congham v. King, Cro. Car. 221.

¹ Stevenson v. Lambard, 2 East, 575.

² Com. Dig. tit. Covenant (B), 8.

³ Simpson v. Clayton, 4 Bing. N. C. 758.

⁴ Holford v. Hatch, 1 Doug. 183; Hare v. Cator, Cowp. 766. In Curtis v. Spitty, 1 Bing. N. C. 756, TINDAL, C. J., said: "The proposition contended for by the plaintiff, is this:—that the lessor may charge the assignee of *part* of the land in an action of debt with the rent of the whole of the land comprised in the original demise. He may undoubtedly, after an assignment of part, *distrain* upon the whole; because the rent for the whole becomes due out of every part of the land; but in that case

it must be remembered that the avowry would be for the rent due from the original tenant and nothing would appear upon the record as to the assignment." Covenants are joint or several, according to the interest of the parties, unless expressly made either joint or several, in which case they cannot be construed otherwise than as the parties intended. Withers v. Bircham, 3 B. & C. 254; Sorabie v. Park, 12 M. & W. 158; James v. Emery, 8 Taunt. 245; Bradburn v. Batfield, 14 M. & W. 559; Anderson v. Martindale, 1 East, 497; Keighley v. Watson, 3 Exchq. 716; Eccleston v. Clipsham, 1 Wm. Saund. 153; Slingsby's Case, 5 Coke. 18 a; Wollaston v. Hake-will, 3 M. & G. 297.

⁵ Broom v. Hore, Cro. Eliz. 638; Ards v. Watkin, Cro. Eliz. 637; Stevenson v. Lambard, 2 East, 575, 579.

formance.¹ No precise technical words therefore are required in a deed to make a stipulation a condition precedent or subsequent; neither does it depend on the circumstance whether the clause is placed prior or posterior in the deed: the merits, therefore, of a question of this kind must depend on the nature of the contract and the order of time in which the acts are to be performed by the contracting parties, and any subsequent facts disclosed which have happened in consequence of the contract. When one act is to be done by one party, before another act which is the consideration of it is to be done by the other, the covenants are dependent, and the other is not bound to perform until the first act has been done, because the first act is a *condition precedent* to performance of the other, and in all cases, where covenants are dependent, they are in the nature of conditions precedent, and must be performed in the order of time in which performance is provided for in the covenant; and in determining whether covenants are dependent or independent the intention of the parties and the good sense of the case will be regarded, rather than the technical sense of the words used.² Where a covenant is part only of the consider-

¹ Grant v. Johnson, 6 N. Y. 247; Babcock v. Williams, 17 Me. 372. Covenants are to be regarded as dependent or independent, according to the intention of the parties and the good sense of the case; and technical words shall give way to such intention. 1 Root, 170; 4 Rand. (Va.) 352; M'Crelish v. Churchman, 4 Rawle, 26; Tileston v. Newell, 13 Mass. 410; Tompkins v. Elliott, 5 Wend. (N. Y.) 496; Barruso v. Madan, 2 Johns. (N. Y.) 145. And the intention of the parties is to be discovered rather from the order of time in which the acts are to be done than from the structure of the instruments or the arrangement of the covenants. Goodwin v. Lynn, 4 Wash. (U. S. C. C.) 714; Speake v. Sheppard, 6 H. & J. (Md.) 85; Gardiner v. Corson, 15 Mass. 504; Hopkins v. Young, 11 Mass. 304. Where one act is to be done by one party before another act, which is the consideration of it, is to be done by

the other, the covenants to do those acts are independent. Tileston v. Newell, 13 Mass. 410; Couch v. Ingersoll, 2 Pick. (Mass.) 300; Goodwin v. Holbrook, 4 Wend. (N. Y.) 377; Cunningham v. Morrell, 10 Johns. (N. Y.) 208; Barruso v. Madan, 2 Johns. (N. Y.) 145; Craddock v. Aldridge, 2 Bibb. (Ky.) 15; Mullins v. Cabiness, Minor (Ala.) 21. Thus, A covenanted with B to dig a canal and keep it open, and B covenanted that all suits against A should cease and determine. Held, that the covenant to keep open, being without limitation of time, was independent, and that when the canal was dug, A might compel B to enter satisfaction on a judgment remaining open against him at the suit of B. Barksdale v. Toomer, 2 Bailey (S. C.) 180; Jones v. Barkley, 2 Doug. 684.

² Hotham v. East India Co., 1 T. R. 645; Newson v. Smythies, 3 H. & N. 840; Todd v. Summers,

tion on one side, and the breach of it may be paid for in damages, it is an independent covenant, and not a condition precedent.¹ If one party covenants to do one thing, the other party doing another, it is not a condition precedent, but a mutual covenant.² A contract to grant a lease upon payment of a certain sum by certain instalments at stated times, the granting of such lease is not a condition precedent to a right to recover the sum agreed upon.³ So where A agrees to sell and B to purchase an estate, and B covenants to pay A on or before a specified day a certain sum as the consideration of such sale, with interest to the time of the completion of the purchase, but no time is fixed for executing the conveyance, A may maintain an action for the purchase-money and interest, without first tendering a con-

Gratt. (Va.) 167; M'Creliah v. Churchman, 4 Rawle (Penn.) 26; Bean v. Atwater, 4 Conn. 8; Tilston v. Newell, 18 Mass. 410; Gardiner v. Corson, 15 Mass. 500; Tompkins v. Elliott, 5 Wend. (N. Y.) 496; Howland v. Leach, 11 Pick. (Mass.) 154; Church v. Ingersoll, 2 id. 800; Mullins v. Cabiness, Minor (Ala.) 21; Parmalee v. Oswego R. R. Co., 6 N. Y. 74; Dwiggins v. Shaw, 6 Ired. (N. C.) L. 46; Barruso v. Maddan, 2 John. (N. Y.) 145. Unless a contrary intention clearly appears, our courts are inclined to construe covenants as dependent. Clapton v. Bolton, 23 Miss. 78; Mecum v. Peoria, &c., R. R. Co., 21 Ill. 533; Liddell v. Sims, 17 Miss. 569; Bangs v. Lowber, 2 Cliff. (U. S. C. C.) 157, especially where one party may enforce performance by the other party and yet refuse to perform himself. Mecum v. R. R. Co., ante. Where covenants are once established as independent, they remain so throughout. Evans v. Harris, 19 Barb. (N. Y.) 416. Where acts are to be done *simultaneously*, and each forms the consideration for the other, they are dependent. Darkin v. Williams, 11 Wend. (N. Y.) 67; Hounsford v. Fisher, Wright (Ohio) 150; Parker v. Parmalee, 20 John. (N. Y.) 180; Day v. Essex Bank, 18 Vt. 97. It does not necessarily follow that a covenant is independent because it goes

only to a part of the consideration; nor that the consideration is divisible in its nature; nor that part of it has been received; nor that one or more of the covenants in an instrument are independent. *The order of time in which they are to be performed* is the test for determining the question. Grant v. Johnson, 6 N. Y. 247. In Butler v. Many, 52 Mo. 497, it was held that in order to be dependent the covenants must be mutual and to the *entire* consideration.

¹ Nelson v. Owen, 41 Ill. 18; Obermyer v. Nicholls, 6 Binn. (Penn.) 166; Bennett v. Pixley, 7 John (N. Y.) 249; Payne v. Bettisworth, 2 A. K. Mar. (Ky.) 166; Boone v. Eyre, 1 H. Bl. 273, n, a; St. Albans v. Shore, 1 id. 270; Portage v. Cole, 1 Wm. Saund. 820 b; Bagallay v. Pettit, 5 C. B. N. S. 637; Carpenter v. Creswell, 4 Bing. 409.

² Boone v. Eyre, 2 W. Blac. 1812; Portage v. Cole, 1 Wms. Saund. 819 b, 820 c; Newson v. Smythies, ante; Macintosh v. Midland Counties Railway Co., 14 M. & W. 548; London Gas Light Co. v. Chelsea Vestry, 8 C. B. S. 215.

³ Freeland v. Mitchell, 8 Mo. 487; Champion v. White, 5 Cow. (N. Y.) 509; Manning v. Brown, 10 Me. 49; Wilcox v. Ten Eyck, 5 John. (N. Y.) 78; Benson v. Hobbs, 4 H. & J. (Md.) 285; Bagallay v. Pettit, 5 C. B. N. S. 637.

veyance.¹ It is a general rule that covenants are to be treated as independent rather than as conditions precedent, especially where some benefit has been derived by the covenantor; and where a penalty is attached for a breach, the covenant is always independent.²

SEC. 310. Particular cases decided respecting repairs.—A covenant to keep a house in repair, from and after the lessor has repaired it, is conditional; and it cannot be assigned as a breach that it was in good repair at the time the lease was made, and that the lessee suffered it to decay; for the lessor must repair before the lessee is liable.³ Where the plaintiff let to the defendant a messuage, barn, stable and buildings, and the defendant agreed to repair the said messuage, buildings and premises, *the same being first put into repair by the plaintiff*; it was held that the repair by the plaintiff was a condition precedent to the obligation on the defendant to keep in repair; that that condition precedent could not be divided, and that the plaintiff was not entitled to recover for the non-repair of any part of the premises without having first repaired the whole.⁴ So if a lessee covenants to repair, “provided always and it is agreed that the lessor shall find great timber,” &c., this makes a covenant on the part of the lessor to find great timber by the word “agreed,” and it shall not be a qualification of the covenant of the lessee;⁵ but where the words were, “he, the said lessor, finding, allowing and assigning timber sufficient for such reparations during the said term, to be cut and carried by the lessee;” it was held not to be a covenant to provide timber, but a mere qualification of the covenant to repair.⁶ Where a lease for lives contained a

¹ *Mattock v. Kinglake*, 10 Ad. & EL. 50; *Wilks v. Smith*, 10 M. & W. 355; 2 Dowl. N. S. 215; *Dunlop v. Grote*, 2 C. & K. 153; *Dicker v. Jackson*, 6 C. B. 103; *Sibthorp v. Brunel*, 8 Exch. 826; *Thames Haven Dock Co. v. Brymer*, 5 Exch. 696, 710.

² *Newson v. Smythies*, 3 H. & N. 843, *POLLOCK*, C. B.

³ *Freeland v. Mitchell*, 8 Mo. 487;

Dawson v. Fitzgerald, 1 L. R. Ex. Div. 257.

⁴ *Slater v. Stone*, Cro. Jac. 645; but see 4 Jarm. Byth. 407 (3d ed.).

⁵ *Neale v. Ratcliff*, 15 Q. B. 916; *Hunt v. Bishop*, 8 Exch. 675; *Hutchinson v. Read*, 4 Exch. 761.

⁶ *Bac. Abr. tit. Covenant (A)*.

⁷ *Thomas v. Cadwallader*, Willes, 496.

covenant by the lessee at his own expense to keep the demised premises in proper repair, "having or taking in and upon the said demised premises competent and sufficient house-bote, hedge-bote, fire-bote, plough-bote and gate-bote for the doing thereof, without committing any waste or spoil:" held in an action for not repairing, that the covenant to repair was absolute, with a license to the lessee to take competent and sufficient house-bote, &c.; and that the finding such house-bote, &c., was not a condition precedent to the liability of the lessee to repair.¹ Where the lessee covenants to put and keep the demised premises in repair, "being allowed rough timber but not on the stem upon the demised premises, the timber to be fetched and carried at the expense of the lessee:" in an action of covenant for not repairing, it is sufficient to allege that the lessor was *ready and willing* to allow and provide sufficient rough timber not on the stem, without stating that he did actually furnish it.² Where a lessee covenanted to repair a house before the first of June, 5,000 slates being found by the lessor towards the repair, and afterwards to keep in repair during the term; it was held, that finding the slates was not a condition precedent to the covenant to keep in repair, but only to the covenant for putting the premises in repair before the first of June.³ In a farming lease the lessee covenanted with the lessor that the lessee should at all times during the term repair and glaze the windows and also the hedges, &c., when necessary, "the said farmhouse and buildings being previously put in repair and kept in repair by the lessor;" the latter clause was held to amount to an absolute and independent covenant on the part of the lessor to put the premises in repair.⁴ A covenant by the lessor to do certain work, containing at the end of the words "and the whole of which is agreed to be left to the superintendence of the lessee and the lessor's son," is neither a condition precedent to, nor concurrent with, the covenant.⁵ The covenant to repair generally, and to repair

¹ Dean and C. of Bristol v. Jones, 1 E. & E. 484.

² Martyn v. Clue, 18 Q. B. 661.

³ Muccleston v. Thomas, Willes, 146.

⁴ Cannock v. Jones, 3 Exch. 238.

⁵ Jones v. Cannock, 5 Exch. 718.

within three months after notice in writing, are independent covenants;' and where a lessee covenanted to leave premises in repair at the expiration of the term, and also that the lessors might direct the lessee to complete the repairs by giving six months' notice in writing, it was held, that these were two distinct and separate covenants, the former of which was not qualified by the latter;' but where a lease contained a covenant by the lessee to repair the premises at all times (as often as need or occasion should require) and "at farthest within three months after notice," it was held to be one entire covenant, the former part of which was qualified by the latter.' Where there was an agreement that the lessee should spend a certain sum in repairs, to be inspected and approved of by the lessor, and to be done in a substantial manner, and the lessee was to be allowed to retain the money out of the first year's rent of the premises, it was held, that the lessor's approval was not a condition precedent to the lessee retaining the rent.' Where a lessee covenanted to expend a certain sum in substantial and beneficial improvements, under the direction or with the approbation of some competent surveyors to be named by the lessor, the appointment of the surveyors was held to be a condition precedent to the lessee's liability to expend the money.' Where the lessor covenanted to pay the lessee for the manure, &c., at the end of the term, upon the lessee delivering up the farm, *if* in the meantime he cultivated it on the four-course system, and performed and kept all and singular other his covenants in the lease: held, that the delivery up of a certain agreement pursuant to a covenant in the lease was not a condition precedent to the tenant's right to recover for the manure, &c.' Where, by deed reciting

¹ Morecraft v. Meux, 4 B. & C. 606; Wood v. Day, 7 Taunt. 646; Baylis v. Le Gros, 4 C. B. N. S. 587.

² Wood v. Day, ante.

³ Horsefall v. Testar, 7 Taunt. 385; cited 4 C. B. N. S. 551.

⁴ Dallman v. King, 4 Bing. N. C. 105, recognized in Stadhart v. Lee, 3 B. & S. 364.

⁵ Coombe v. Greene, 11 M. & W. 480; Cannock v. Jones, 3 Exch. 283; 5 Id. 718; Hunt v. Bishop, 3 Exch. 675.

⁶ Newson v. Smythies, 3 H. & N. 840; 23 L. J., Exch. 97; 1 F. & F. 477.

an agreement to let copyhold premises, A covenanted that as soon as he had procured a license from the lord of the manor he would lease them to B for the then residue of a term of years from a certain day, and B covenanted that he would repair during the term so to be granted, it was held that B was liable on this covenant after having occupied the premises for the whole term, though no license had been procured from the lord nor any lease ever made.¹

SEC. 311. ~~Cases decided respecting other matters.~~—Where a lessee covenanted to leave sufficient compost on the soil of the landlord at the end of the term, he, the lessee, having the yard, barn and a room to lodge in and dress diet; it was held to be a mutual and not a conditional covenant, as it differed from a case where the tenant covenants to repair if the lessor finds sufficient timber, for there the proviso restrains the covenant; but in this case, said LORD MANSFIELD, there is not the least foundation for such construction.² Where in a lease for seven years, containing the usual covenants that the lessee should pay the rent, keep the premises in repair, &c., there was a proviso that the lessee might determine the term at the end of the first three or five years, giving six months' previous notice, and that then, from and after the expiration of such notice, and payment of all rents and duties to be paid by the lessee, and performance of all his covenants until the end of the three or five years, the indenture should cease and be utterly void, it was held, that the payment of rent and performance of the other covenants were conditions precedent to the lessee's determination of the term at the end of the first three years, and that his merely giving six months' notice, expiring within the first three years, was not sufficient for that purpose.³ A mining lease contained numerous covenants by the lessees, and also a proviso that if they should desire to quit the premises at the end of the first eight years, and should give eighteen months' notice

¹ Pistor v. Cáter, 9 M. & W. 315.

² Porter v. Shephard, 6 T. R. 655.

³ Dodd v. Innis, Lofft. 56.

thereof to the lessor, then, all arrears of rent being paid, and all and singular the covenants and agreements on the part of the lessees having been observed and performed, the lease should at the expiration of the eighth year be utterly void; but, nevertheless, without prejudice to any claim or remedy which any of the parties might then be entitled to for breach of any of the covenants; it was held, in error, that the performance of *all* the covenants by the lessees was a condition precedent to their right to determine the lease.¹ Another court of error, however, appears to have entertained a different opinion.² A lease contained a proviso, that if the lessor should give notice for the delivery up of the land to him, the lessee covenanted to surrender it up, and that the lessor might take possession of it, paying the lessee compensation for money expended thereon: it was held, that the proviso did not operate as a mere covenant by the lessee to give up on notice, but expressly gave the lessor power to take possession; and that he might do so without having first paid compensation.³ Where A covenanted to pay an annuity to B, who covenanted for the assignment and quiet enjoyment of premises, the entering into which covenants was the consideration, it was held, that they were not dependent.⁴ So where it was agreed that the lessor should, within eighteen months from the date of the lease, build a cattle-shed, the whole to be left to the superintendence of the lessee and her son, it was held, that this latter provision was not a condition precedent to or concurrent with the lessor's covenant to build.⁵ On a lease of some coal mines, the lessees covenanted that the lessor should, when he thought fit, employ a fit and proper person to weigh the coals and keep the accounts, the person so weighing and keeping the accounts to be paid by the lessees; but in case such person did not duly attend to his duties, the lessees were authorized to discharge him: held, that the appointment of a fit and proper person was a condition precedent to

¹ *Friar v. Grey*, 5 Exch. 584.

² *Grey v. Friar*, 15 Q. B. 901.

³ *Gardner v. Kennard*, 12 Q. B. 244.

⁴ *Rose v. Poulton*, 2 B. & Ad. 822.

⁵ *Cannock v. Jones*, 8 Exch. 233.

⁶ *id.* 718.

the liability of the lessees to pay the wages, and that therefore they were not bound to pay the wages though they had not dismissed him.' An assignee of a term in coal mines covenanted with the lessee that he would, so long as he should be in receipt of the rents of the premises, pay to the lessors the rent payable by the original lease, and would keep the lessee harmless and indemnified against the rents and covenants of the lease: it was held, that the words "so long as he should be in receipt of the rents" did not extend to the covenant to indemnify.' A covenant in a farming lease provided that the tenant should consume and convert into manure, and spread on the premises, all the turnips, &c., grown thereon; but that in case he should sell off any part thereof, which he was at liberty to do, then that he should for every ton of turnips, &c., so sold off, bring back and spread thereon one ton of manure within three months after. In an action on this covenant the plaintiff set out the first part only, and assigned for breach that the defendant carried away fourteen acres of turnips, without converting the same into manure and spreading the same: it was held, that the covenant was an alternative one, and that the plaintiff should have negatived the bringing back, within the time limited, an equivalent in manure.'

SEC. 312. *How covenants are discharged, generally.*—Covenants cannot be discharged *before breach* otherwise than by deed; therefore a parol license or agreement, dispensing with or charging the terms of such an obligation, cannot be pleaded in bar to an action of covenant; except perhaps by way of equitable defense in some cases.'

SEC. 313. *When discharged by the operation of statutes.*—With respect to the operation of statute in discharging

¹ *Lawton v. Sutton*, 9 M. & W. 795. *Thompson v. Brown*, 7 Taunt. 656;
² *Crossfield v. Morrison*, 7 C. B. *Sellers v. Bickford*, 1 Moo. 460;
286. *Cordwell v. Hunt*, 8 Taunt. 596;
³ *Richards v. Bluck*, 6 C. B. 437. *Harris v. Goodwin*, 2 M. & G. 405;
⁴ *Littler v. Holland* 3 T. R. 590; *West v. Blakeway*, 2 M. & G. 729;

the obligation of a covenant there is this difference, viz., that where a man covenants not to do an act or thing which it was lawful to do, and a statute is made afterwards and compels him to do it, the statute repeals the covenant; so, if one covenants to do a thing which is lawful, and a statute comes in and hinders him from doing it, the covenant is repealed;¹ but if a man covenants not to do a thing which at the time was unlawful, and an act comes and makes it lawful to do it, such statute does not repeal the covenant;² and if the covenant is to do that which is afterwards made unlawful in part only, it must be performed so far as it continues lawful.³ If there is a covenant to do a thing which is unlawful by statute, the covenant will not be made lawful by the repeal of the statute, because the covenant was bad *ab initio*; although it would be otherwise if the covenant had been originally lawful, but had been made unlawful by a statute which was itself afterwards repealed.⁴ Though all the rent of the lessee is assigned by statute if there are no words of discharge, the lessee is still liable to an action of covenant for the rent.⁵

¹ Brewster v. Kitchell, 1 Salk. 198; Marquis of Anglesea v. Rugeley, 6 B. B. 107; Brown v. Mayor, &c., of London, 9 C. B. N. S. 726; 13 id. 828; Bac. Abr. Tit. Condition (Q), 2; Com. Dig. Tit. Condition (L), 1.

² Brewster v. Kitchell, 1 Salk. 198.

³ 2 Eq. Ca. Abr. 26.

⁴ Jacques v. Withy, 1 H. Bl. 65; Bac. Abr. Tit. Covenant (E), 4, n.

CHAPTER XXXI.

IMPLIED COVENANTS.

SEC. 814. Implied covenants.

SEC. 815. Implied covenants by lessee.

SEC. 816. Covenants when implied from express words in other covenants.

SEC. 314. Implied Covenants.—What are.—An implied covenant is a covenant which the law raises or implies from the nature of a transaction and the language employed and therefore is called a covenant in law. “It is,” says the court in one case,¹ “an agreement which the law infers or implies from the use of certain words

¹ Williams v. Burrell, 1 C. B. 429. A covenant in law is such a covenant as the law implies from the nature of the transaction, and from the use of certain words which have a known legal operation and effect in the creation of an estate; in other words, which have both a primary and secondary significance in a lease or deed, and which, after being given their primary effect, have a secondary force by raising an agreement on the part of the grantor to protect and preserve the estate granted. The word “demise” imports a covenant for quiet enjoyment, and, unless expressly qualified or restrained, the law, from its use, implies such a covenant, Barney v. Keith, 4 Wend. (N. Y.) 602; Molder v. Carondelet, 26 Mo. 112; Burnett v. Lynch, 5 B. & C. 589; Holder v. Taylor, Hob. 12; Adams v. Gibney, 6 Bing. 656; Fraser v. Skey, 2 Chit. 646; Iggulden v. May, 9 Ves. 325, and such a promise is implied even when premises are demise by parol. Messent v. Reynolds, 3 C. B. 194; Hancock v. Coffin, 3 C. B. 194. But from the

mere fact of letting, no covenant is implied that the lessor had good title, Mack v. Patchin, 42 N. Y. 167; Maule v. Ashmead, 20 Penn. St. 482; Granger v. Collins, 6 M. & W. 458; Bandy v. Cartwright, 8 Exchq. 918; Baugher v. Wilkins, 16 Md. 35, or that he had power to let without restriction as to the uses to which the premises might be put. Jackson v. Cobbin, 8 M. & W. 790. While an executed consideration from which the law will imply a promise or covenant, will not support any other promise than that which the law implies, Roecorler v. Thomas, 3 Q. B. 234; Kaye v. Dutton, 2 D. & L. 296; Lattimore v. Garrand, 1 Exchq. 809, yet parol evidence is admissible to explain the circumstances under which the lease was granted, in order to raise an implied promise. Thus, a renewed lease of a mill was granted to a bleacher for the purpose of carrying on his business, and it was held that parol evidence was admissible to explain the special circumstances under which the lease was granted and from which an implied grant

having a known legal operation in the creation of an estate : so that after they have had their primary operation in creating the estate, the law gives them a secondary force, by implying an agreement on the part of the grantor to protect and preserve the estate so by these words already created ; as, if a man by deed demise lands for years, covenant lies upon the word 'demise,' which imports a covenant for quiet enjoyment. ”¹

to use the stream for the purpose of such business may be inferred. “I think,” said POLLOCK, C. B., “that we are at liberty to ascertain the mode in which the premises had been enjoyed by the former lessee; their enjoyment as bleaching works being the object intended by the lessor in granting the lease. * * * The lessor with full knowledge of the mode in which premises had been used by the former lessee, grants to the defendant a new lease of the premises for the same purpose; and the plaintiff who purchased the reversion stands in the same position as the lessor, and cannot derogate from his own grant.” See also opinion of WILDE, B., in same case, where he says: “Each case must depend on its own circumstances and the intention of the parties, to be ascertained from the character, state, and use of the premises at the time of the grant.” *Hull v. Lund*, 1 H. & C. 676. Not only will a contract or covenant for quiet enjoyment be implied, but also a covenant that the lessor will not by his own acts destroy the beneficial enjoyment of the premises. *Wade v. Halligan*, 16 Ill. 507, and that the lessee may do any acts necessary to insure the beneficial enjoyment of the premises for the purposes for which they were rented. *Davis v. Brigham*, 29 Me. 391; *Wyman v. Farrar*, 35 id. 64. Anything necessary to the use and enjoyment of the demised premises for the purposes intended by the parties, must be implied when not expressed in the lease. *Kelsey v. Durkee*, 33 Barb. (N. Y.) 410. There is no implied covenant that the premises are fit for the purpose for which they are let, or that they shall remain so. *Libbey v. Talford*, 48

Me. 816; *Robbins v. Mount*, 4 Robt. (N. Y.) 553; *Foster v. Peyser*, 9 Cush. (Mass.) 242; *Dutton v. Gerrish*, 6 Cush. (Mass.) 89; *McGlosham v. Talmadge*, 87 Barb. (N. Y.) 813; *Mayer v. Muller*, 1 Hilt. (N. Y. C. P.) 491. But where a building being erected is leased, and from the terms of the lease and the subsequent acts of the parties it appears that they both understood that the building was to be finished as a store, a covenant is implied that the building shall be fit for use as a store at the time when the term commences. *La Forge v. Mansfield*, 31 Barb. (N. Y.) 845. But from a recital in a lease that the premises are to be used as a boarding house, there is no covenant implied that they shall be fit for that purpose, and even if there was, there would be no covenant that it should be fit for any particular description of boarding house not expressed in the lease. *Roosevelt v. Abbott*, 2 Robt. (N. Y. Superior Ct.) 156. It has been held, however, that when, from the circumstances attending the making of the lease, that the lessee intended to procure a fire-proof warehouse, and the lease is of premises “together with the fire-proof cotton warehouse built thereon,” a covenant is implied that the warehouse is fire-proof. *Vaughan v. Mattock*, 23 Ark. 9, but the covenant cannot be extended by implication so as to make the lessor a covenantor that it shall remain fire-proof during the whole term. *Branger v. Munciet*, 80 Cal. 624.

¹ The words “grant and demise” in a lease for years import a covenant on the lessor’s part that he has power to lease, and also of quiet enjoyment during the term. *Barney v. Keith*, 4 Wend. (N. Y.

Although a deed or lease contains express covenants, yet other covenants may be implied, but the latter will be raised or given effect to only when they are consistent

402; *Crouch v. Fowle*, 9 N. H. 219; *Style v. Hearing*, Cro. Jac. 73; *Adams v. Gibney*, 6 Bing. 656; *Noke's Case*, 4 Coke, 81 a; *Burnett v. Lynch*, 5 B. & C. 585; *Iggulden v. May*, 9 Ves. 825. The common law covenants have been so generally superseded by personal covenants as to be of little practical value. *Jones v. Franklin*, 80 Ark. 681. The implied covenant for title, *Line v. Stephenson*, 4 Bing. N. C. 678; 5 Bing. N. C. 188; *Burnett v. Lynch*, 5 B. & C. 589, and quiet enjoyment, *Noke's Case*, 4 Coke, 80 b; Cro. Eliz. 674; *Holder v. Taylor*, Hob. 12; *Gainsford v. Griffith*, 1 Saund. 58; 2 Keb.; *Andrew's Case*, Cro. Eliz. 214; *Pomfret v. Ricroft*, 1 Saund. 821; 1 Vent. 26, 44; *Coleman v. Sherwyn*, 1 Show. 79; 1 Salk. 187; *Bragg v. Wiseman*, 1 B. & Gold. 22; *Deering v. Farrington*, 1 Mod. 118; *Style v. Hearing*, Cro. Jac. 73; *Hayes v. Bickerstaffe*, Vaugh. 118; *Fraser v. Skey*, 2 Chit. 646; *Smith v. Chambers*, 4 Esp. 164; *Merrill v. Frame*, 4 Taunt. 829; *Burnett v. Lynch*, ante; *Adams v. Gibney*, 6 Bing. 656; *Iggulden v. May*, 9 Ves. 825; *Smith v. Pocklington*, 1 Cr. & J. 445; *Williams v. Burrell*, 1 M. G. & Sc. 402; *Hart v. Windsor*, 12 M. & W. 68, arising on the word *demise* has yielded in practice to the express covenant for quiet enjoyment, which by its power of limiting the liability intended to be assumed by the lessor, and guaranteeing the enjoyment of the estate during the whole term granted to the lessee, presents readier means than the former of effecting the intention of the parties; for it is well established, in accordance with the maxim, *expressum facit tacitum cessare*, *Merrill v. Frame*, ante, that the general implication of title in a lease for years, *Noke's Case*, ante; *Merrill v. Frame*, ante; *Line v. Stephenson*, ante; *Stannard v. Forbes*, 6 Ad. & El. 572, 587, though not in a lease for life, *Shep. Touch. 165*; Co. Lit. 884 a, is restrained by the particular

express covenant. Hence, if a lessor covenants against disturbance by himself or any person claiming under him, and the lessee is evicted by one having a paramount title, he cannot recover under the covenant for general title implied in the word *demise*. *Merrill v. Frame*, ante. But here a distinction is observable; for where a party, reciting a lease for years of a mill to himself and A, and that A died, whereby he had, as he supposed, the whole by survivorship, granted the mill and all his estate therein to another; and covenanted for quiet enjoyment without any act done by him, the grantor; and the grantee was evicted of a moiety by the grantee of the deceased joint-tenant; the court held that the general covenant implied by the word *grant* was not restrained by the subsequent qualified covenant. And they said it did not resemble *Noke's Case*, 4 Coke, 80 b; Cro. Eliz. 674, where the grant being once good for the whole, and becoming bad by eviction after, the covenant subsequent qualified the general covenant; but that, in the principal case, the grant according to the purport of it was never good; for over the one moiety which had been previously granted by his companion the grantor had no power. *Johnson v. Proctor v. Johnson*, Yelv. 175; Cro. Jac. 288. The word *demise*, however, in a lease of real property only, does not imply a contract for any particular state of the property at the time of the lease; nor that it is fit for the purpose for which it is let. *Hart v. Windsor*, 12 M. & W. 68. Though the express covenant may in some degree abridge the security of the lessee, yet in one important particular it is more advantageous to him than the implied covenant: as the latter determines with the interest of the party out of whose estate it arises, it follows that if a party take a lease for a certain term under an impression that the lessor is tenant in fee, when in fact

with the former.¹ But, where there is an express covenant relating to the same matter as that embraced in the implied, however qualified, the implied covenant will be excluded upon the principle *expressum facit cessare tacitum*.² Thus, where there is an express covenant relating to quiet enjoyment, the implied covenant arising from the use of the word "demise" is thereby restrained, and, even though two covenants are implied from the word, one that the lessor has power to grant, and the other for quiet enjoyment, yet, it seems that a subsequent express covenant for quiet enjoyment applies to the whole.³ The covenant implied from the word "demise" does not em-

he is tenant for life only, the right of suing on that covenant will be defeated by the lessor's death, and the lessee left without remedy on eviction by the remainder-man. *Swan v. Stransham*, 3 Dy. 257 a; *Serles v. Stransham*, 1 And. 12; *Bragg v. Wiseman*, 1 Brownl. 22; *Adams v. Gibney*, 6 Bing. 656. The words "yielding and paying" amount to an implied covenant only, and the lessee is not liable for rent thereon after he has assigned his term. *Kempton v. Walker*, 9 Vt. 191.

¹ *Crouch v. Fowle*, 9 N. H. 219; *Roebuck v. Dupoy*, 2 Ala. 585; *Morris v. Harris*, 9 Gill. (Md.) 19; *Gates v. Caldwell*, 7 Mass. 68; *Vanderkarr v. Vanderkarr*, 11 John. (N. Y.) 122; *Blair v. Hardin*, 1 A. K. Marsh. (Ky.) 282. The covenants arising from the use of the words "grant, bargain and sell," are held not to be inconsistent with or restrained by an express covenant of warranty. *Funk v. Voneida*, 11 S. & R. (Penn.) 109; *Seitzinger v. Weaver*, 1 Rawle (Penn.) 377. But in New York it has been held that an express covenant will do away the effect of all implied covenants. But whether this is so or not will depend upon the language used, and the intention of the parties to be gathered therefrom. *Vanderkarr v. Vanderkarr*, 11 John. (N. Y.) 122; *Frost v. Raymond*, 1 Cai. (N. Y.) 192. See also, similar in doctrine, *Sumner v. Williams*, 8 Mass. 201. In any event, a general implied covenant may be restrained by an express covenant, as an im-

plied covenant arising from the use of the word "demise," in a lease, is restrained and qualified by an express covenant for quiet enjoyment. *Noke's Case*, 4 Coke 80 b; *Kent v. Welch*, 7 John. (N. Y.) 458; *Deering v. Farrington*, 1 Mod. 113. See also, *Pincombe v. Rudge*, Yelv. 139.

² *Pray v. Great Falls Co.*, 38 N. H. 442; *Messent v. Reynolds*, 3 C. B. 194; *Merrill v. Frame*, 4 Taunt. 329; *Line v. Stephenson*, 4 Bing. N. C. 678; *Noke's Case*, 4 Coke 80 b.

³ *TINDAL, C. J.*, in *Line v. Stephenson*, 4 Bing. N. C. 683. The implied covenant for title and quiet enjoyment, arising on the word "demise" has practically yielded to the express covenant for quiet enjoyment, *Hart v. Windsor*, 12 M. & W. 66; *Jones v. Franklin*, 30 Ark. 681; *Noke's Case*, ante; *Williams v. Burrell*, 1 M. G. & S. 402; *Holder v. Taylor*, Hob. 12 a; *Iggulden v. May*, 9 Ves. 325; *Fraser v. Skey*, 3 Chitt. 646; *Gainsford v. Griffith*, 1 Saund. 58; *Smith v. Chambers*, 4 Esp. 164; *Stannard v. Forbes*, 6 Ad. & El. 572; *Pomfret v. Ricroft*, 1 Saund. 321; *Smith v. Pocklington*, 1 Cr. & J. 445, and an action for a disturbance in his enjoyment of the premises will only lie upon the express covenant. *Merrill v. Frame*, 4 Taunt. 329. But see *Johnson v. Proctor*, Yelv. 175, where the court held that the general covenant implied from the word "grant" was not qualified by a subsequent qualified covenant, and that an action could be maintained upon the implied covenant.

brace a contract for any particular state of the property at the time when the lease was executed, nor that the property is fit for the purposes for which it was let; nor is there ever an implied covenant that the premises are even reasonably fit for habitation, occupation or cultivation,¹ nor that they shall remain so, or even that the buildings shall endure, or the premises remain in a condition suitable for occupation.² But such a covenant may be implied when it is warranted from the language used in the lease, and such appears to have been the intention of the parties. A contract for quiet enjoyment may be implied from a parol demise of premises, but this does not extend to or include an undertaking that the lessor has a good title,³ and if the contract is stated too broadly the plaintiff will be defeated in his action.⁴ That is, when the right of action depends upon an implied covenant, it must not be stated more broadly than the law implies.⁵ Thus, where the lessee in his declaration alleged an implied covenant that the lessor had power to let the premises without restriction as to the purposes for which they should be used,⁶ or that the lessor had covenanted for quiet enjoyment "without any eviction from or by the party or parties entitled to the reversion of or in the said demised premises," it was held that no such covenants could be implied, and consequently that the declaration was too broad.⁷ The words "covenant" or "condition," when used in a lease not under seal, do not mean the same as when employed in a lease under seal, but, in order to carry out the intention of the parties, will be con-

¹ *Keates v. Earl of Cadogan*, 10 C. B. 591; *Hart v. Windsor*, 13 M. & W. 68; *Witty v. Matthews*, 52 N. Y. 512; *Cowell v. Lumley*, 39 Cal. 151.

² *Arden v. Pullen*, 10 M. & W. 321; *Galt v. Gandy*, 2 E. & B. 845; *Keats v. Earl of Cadogan*, 10 C. B. 591.

³ *Bandy v. Cartwright*, 8 Exchq. 913; *Hancock v. Coffyn*, 8 Bing. 366; *Messent v. Reynolds*, 8 C. B. 194. The very fact that a person grants a lease, or agrees to do so, implies a promise or agreement on

his part that he has authority to do so. *Stranks v. St. John*, L. R., 2 C. P. 276.

⁴ *Wilcox v. Cahn*, 5 Blatchf. (U. S. C. C.) 346; *Granger v. Collins*, M. & W. 458; *Jackson v. Cobbin*, 8 M. & W. 790.

⁵ *Roscorla v. Thomas*, 8 Q. B. 284; *Kaye v. Dutton*, 2 D. & L. 296; *Lattimore v. Garrard*, 1 Exchq. 809; *Hall v. Lund*, 1 H. & C. 676.

⁶ *Jackson v. Cobbin*, ante.

⁷ *Granger v. Collins*, 6 M. & W. 458.

strued to mean contract or stipulation, otherwise they would be meaningless, and the real purpose of the parties to the instrument would fail.¹

An implied covenant cannot arise on the demise of a party having only an equitable title, nor when the word demise is referable to a subject not strictly capable of being demised,² and it ceases with the estate of the lessor, and does not necessarily continue during the entire term demised. Especially is this the case where a tenant for life demises an estate for a term and dies before the term is complete,³ but in case of an express covenant it continues in force during the whole term granted, and does not cease with the lessor's estate.⁴

SEC. 315. Implied covenants by lessee.—In the absence of any express covenant on the subject, a covenant or promise is implied on the part of the lessee that he will use the buildings in a tenantable and proper manner,⁵ and that he will manage and cultivate the lands in a good and husbandlike manner, according to the custom of the country;⁶ but not that he will make a certain quantity of fallow, and spend a certain quantity of manure thereon, and keep the buildings in repair, or any other stipulation not arising out of the bare relation of landlord and tenant.⁷ In declaring on such implied covenant, the plaintiff

¹ *Hoyne v. Cummings*, 16 C. B. N. S. 461.

² *Smith v. Pocklington*, 1 Cr. & J. 445; *Hind v. Gray*, 1 M. & G. 195.

³ *Adams v. Gibney*, 6 Bing. 656; *Swan v. Stransham*, Dyer, 257 a; *Penford v. Abbott*, 32 L. J. Q. B. 67. An implied covenant passes to an assignee, and is good so long as the lessor's estate continues, *Bacon's Abr. Tit. Covenant*; *Vyvyan v. Arthur*, 1 B. & C. 410, but it will not support an action against the lessor's executors, &c., when the term ceases with the lessor's death. *Swan v. Stransham*, ante. Nor where a lease is made by husband and wife is such covenant binding upon the wife after the husband's death, and if she enters and avoids the lease no

action lies against her. *Bragg v. Wiseman*, Br. & G. 22.

⁴ *Bragg v. Wiseman*, Br. & G. 22; *Williams v. Burrell*, 1 C. B. 402.

⁵ *Horsefall v. Mather*, Holt, 7; *Leach v. Thomas*, 7 C. & P. 337; *Harnett v. Maitland*, 16 M. & W. 257; *Yellowly v. Gower*, 11 Exch. 294.

⁶ *Powley v. Walker*, 5 T. R. 373; *Legh v. Hewitt*, 4 East, 154; *Angerstein v. Handson*, 1 C. M. & R. 789; *Earl of Falmouth v. Thomas*, 1 Cr. & M. 89; *Halifax v. Chambers*, 4 M. & W. 662; *Martin v. Gilham*, 7 Ad. & El. 540; *Bickford v. Parson*, 5 C. B. 920; *Wilkins v. Wood*, 17 L. J. Q. B. 319; *Bullen & L.*, Pl. 176 (2d ed.).

⁷ *Brown v. Crump*, 6 Taunt. 300.

should avoid stating the particulars of the alleged custom, but may allege specially any breaches of it.¹ A strict legal custom need not be proved, but only the prevailing course of good husbandry and management in the neighborhood, and a breach or breaches thereof.² Where a custom of the country is proved to exist, it will be considered applicable to all tenancies in whatever way created, whether verbal or in writing, unless expressly or impliedly excluded by the terms actually agreed on.³

SEC. 316. *Covenants, when implied from express words in other covenants.*—Where a lease covenanted to plough, sow, manure and cultivate the demised premises, except a certain specified part of the land in a due course of husbandry, it was held that it amounted to a covenant not to plough the part excepted.⁴ Where a lessee covenanted that he would, at all times and seasons of burning lime, supply the lessor and his tenants with lime at a stipulated price, for the improvements of their lands and repair of their houses; it was held that this was an implied covenant also that he would burn lime at all such seasons; and that it was not a good defence to plead that there was no lime burned on the premises out of which the lessor could be supplied.⁵ So a covenant by a lessee to pen and fold his flock of sheep, which he should keep upon the premises, upon such parts where the same had been usually folded, was held to amount by implication to a covenant to keep a flock of sheep.⁶ A landlord having accepted the offer of a tenant, whose term was expiring, to continue tenant, provided he could not find any other tenant, at the rent it appeared to him to be worth, by a certain day, it was held to be an implied condition that the tenant should allow persons applying for the farm to go over it, and that the condition not having been per-

¹ *Angerstein v. Handson*, 1 C. M. & R. 789; *Powley v. Walker*, 5 T. R. 378; *Legh v. Hewitt*, 4 East, 154.

² *Legh v. Hewitt*, ante.

³ *Wigglesworth v. Dallison*, 1 Doug. 190; 1 Smith L. C. 458, 460, (4th ed.); *Senior v. Armytage*, Holt, 197; *Hutton v. Warren*, 1 M. &

W. 466; *Wilkins v. Wood*, 17 L. J. Q. B. 319.

⁴ *Duke of St. Albans v. Ellis*, 16 East, 352.

⁵ *Earl of Shrewsbury v. Gould*, 2 B. & Ald. 487.

⁶ *Webb v. Plummer*, 2 B. & Ald. 746.

formed the contract was at an end.¹ On a demise of a brewery, and the exclusive privilege of supplying ale, it would seem that no covenant can be implied with respect to such a privilege from the word "demise."² In an agreement for a lease from the plaintiff to the defendant, the plaintiff agreed to supply to the defendant 'he whole of the chlorine still waste as it comes from the still, neither adding to nor taking anything from the same, at a given rate per cwt., and not to use or injure, or part with any of the still waste, except to the defendant, so long as he should hold the works. It was held, that the defendant was bound to take the whole of the waste which, during his occupancy, came from the plaintiff's still.'³ A demise was made of a mansion-house and land, with the sole license of sporting over all other lands of the lessor, and he covenanted that if any of his tenants should obstruct the lessee in the enjoyment of his license, then the lessor would, on the requisition of the lessee, give the tenant notice to quit, and would enforce such notice; it is no breach of this covenant if the lessor subsequently demises some of his lands for a term of years, without any clause to prevent the tenant from obstructing the person having the license of sporting to enjoy his license, and without reserving a power to give a notice to quit if he did.'⁴ A lease of alum mines gave the lessee the right to obtain alum from certain coal wastes. A subsequent lease of the coal mines provided that nothing thereby granted should injure the rights of the parties who held the alum mines. The alum existed in the coal wastes. The coal lessees could not thoroughly work the coal without removing the pillars which supported the roof; but by doing this, the alum would be rendered impossible to be reached: it was held, that the coal pillars could not be removed.'⁵

A covenant will not be implied in a lease of mines for

¹ Marquis of Hertford v. Hunt, 1 M. & W. 690.

² Hinde v. Gray, 1 M. & G. 195; 1 Scott, N. B. 128.

³ Bealy v. Stuart, 7 H. & N. 758; 31 L. J. Exch. 281.

⁴ Newton v. Wilmott, 8 M. & W. 711.

⁵ Glasgow v. Hurlet Alum Co., 3 H. L. Cas. 25.

the lessee to sink a pit or shaft, although various provisions of the lease cannot be carried into effect without their doing so.¹ The tendency of modern decisions is *not to imply covenants or stipulations which might or ought to have been expressed, if intended.*² Where words of recital or reference manifest a clear intention that the parties shall do a certain act, from these, a covenant to do such acts may be implied.³ But where parties expressly covenant to do certain acts, the covenant will not be extended by implication, but the parties having expressed some, will be treated as having expressed *all* the conditions by which they intend to be bound,⁴ and a covenant will never be implied unless it is consistent with the express covenants.⁵ A recital in a deed may amount to a covenant, if such was the intention of the parties,⁶ and an action of covenant will lie upon such *implied* covenant.⁷ An implied covenant ceases with the estate of the lessor, and does not necessarily continue during the whole term granted. Therefore, if a tenant for life demises by indenture for fifteen years, without any express covenant for quiet enjoyment, upon his death during the term the covenant in law implied from the word "demised" will cease.⁸ But an express covenant, or one to be implied by construction of words used in the deed by way of warranty or contract, would continue in force to the end of the term expressed to be granted, and not merely during the actual continuance of such term.⁹ A covenant in law goes to the assignee of the term, and he has the advantage of it during the actual continuance of the

¹ James v. Cochran, 7 Exchq. 170.

² Aspdin v. Austin, 5 Q. B. 671; Sharp v. Waterhouse, 7 E. & B. 816; Dunn v. Sayles, 5 Q. B. 685; Smith v. Hawich, 2 C. B. N. S. 651; Marquis of Bute v. Guest, 15 M. & W. 160.

³ Sampson v. Easterby, 9 B. & C. 505; aff'd, 6 Bing. 644; Saltoun v. Houston, 1 Bing. 433; Frey v. Johnson, 23 How. Pr. (N. Y.) 816.

⁴ Aspdin v. Austin, ante; Dunn v. Sayles, 5 Q. B. 685.

⁵ Gates v. Caldwell, 7 Mass. 68; Crouch v. Fowle, 9 N. H. 249; Boebuck v. Dupuy, 2 Ala. 535;

Morris v. Harris, 9 Gill (Md.) 19; Vanderkarr v. Vanderkarr, 11 John. (N. Y.) 122.

⁶ Say v. Mottram, 19 C. B. N. S. 479.

⁷ Severn v. Clark, 2 Leon. 122; Farral v. Hilditch, 5 C. B. N. S. 840; Hollis v. Carr, 2 Mod. 87; Saltoun v. Houston, 1 Bing. 433; Sampson v. Easterby, 6 Bing. 644; Barefoot v. Freswell, 3 Keb. 465.

⁸ Swan v. Stransham, Dyer, 257; a; cited 6 Bing. 666; Adams v. Gibney, 6 Bing. 656; Penford v. Abbott, 32 L. J. Q. B. 67.

⁹ Williams v. Burrell, 1 C. B.

term. But the executors or administrators of the lessor are not liable where the term ceases on his death, and the lessee is subsequently evicted.¹ So where husband and wife join in a lease of the wife's freehold, and after husband's death the wife enters and avoids the lease.²

402; *Bragg v. Wiseman*, Brownlow & G. 22; *Shep. Touch.* 178.

¹ *Bac. Abr. Tit. Covenant (E)* 5; *Vyvyan v. Arthur*, 1 B. & C. 410.

² *Bragg v. Wiseman*, Brownlow & G. 22.

CHAPTER XXXII.

COVENANT TO INSURE.

SEC. 317. Generally.

SEC. 318. Covenant to insure where no loss has occurred.—Charles v. Altin.

SEC. 319. Where a loss has occurred.

SEC. 317. *Generally.*—Where the lease contains a covenant on the lessee's part to insure the premises, he must perform the covenant, or, in case of the destruction of the premises by fire, he will be liable for the value of the premises destroyed. But, whether the premises are destroyed by fire or not, he is liable upon his covenant if he permits the premises to remain uninsured for a period, however short.¹ If the lease is silent as to whether the policy shall be taken in the name of the lessor or lessee, a policy in the name of either will fulfil the covenant,² but if the lease specifies how the policy shall be taken out, it must be strictly followed, and this is true both as to the name of the insured, the company in which the policy shall be taken, the amount, &c.³ So if the lease requires *all* the buildings to be insured, a failure to insure *one* of them operates as a breach.⁴ But where a forfeit-

¹ *Darlington v. Ulph*, 18 Q. B. 204; *Pitt v. Shewin*, 3 Camp. 184; *Wilson v. Wilson*, 14 C. B. 616; *Baker v. Jones*, 5 Exchq. 498; *Hyde v. Watts*, 12 M. & W. 204; *Flower v. Peck*, 1 B. & Ald. 428.

² *Pitt v. Laming*, 4 Camp. 73.

³ In *Maston v. Gladwin*, 6 Q. B. 953, the lease required the policy to be taken in the names of the lessor and lessee jointly, but the lessee took out a policy in his name alone, and it was held a continuing breach of the covenant, although he showed the policy to the lessor, who approved of it and ac-

cepted rent thereafter. In *Pen-niall v. Harborne*, 11 Q. B. 868, the lessee covenanted to insure in the names of three persons specifically named. He procured an insurance in the names of the three *and himself*, and it was held a breach of the covenant. See *Ketaltas v. Coleman*, 2 E. D. S. (N. Y.) where it was held that a covenant requiring insurance for the benefit of the landlord, an insurance in the name of the lessee is not a compliance with the covenant.

⁴ *Darlington v. Ulph*, ante; *Pen-niall v. Harborne*, 11 Q. B. 868.

ure is provided for a failure to insure in the mode prescribed in the covenant, and the insurance is not procured as prescribed in the covenant, the lessor, knowing how the insurance is taken, by acquiescing therein, or so conducting in reference thereto as to induce a man of ordinary prudence to understand that he is satisfied therewith, cannot afterwards insist upon the forfeiture, but he may proceed upon the covenant for damages for its breach;¹ and where the lease provides that if the lessee does not insure, the lessor may, if the lessor induces the lessee to believe that he has insured, when in fact he has not, he cannot claim a forfeiture nor maintain ejectment for the breach.* If the lease provides that the lessee shall insure the premises, and employ the insurance money in the re-instatement of the premises, not only the lessor, but an assignee of the reversion, may maintain an action for its breach, by neglecting or refusing so to apply the money, as to this extent it is a covenant running with the land, although, when there is no provision for rebuilding, and no statute relating to the matter, it is treated as merely personal, and available only to the lessor or his personal representatives.* Where the covenant requires the lessee to insure a certain building, as "a

¹ Knight v. Rowe, Ry. & Moo. 346.

² Pitman v. Sutton, 9 C. & P. 706.

* In Vernon v. Smith, 5 B. & Ald. 1, the tenant covenanted to insure to the amount of £800. There was no covenant to re-instate the premises with the money, but merely a covenant to pay it over to the lessor, his executors, administrators or assigns. The premises were within the weekly bills of mortality mentioned in 14 George, 3, c. 78, and under this statute it was held to be a covenant running with the land, and for that reason the action, in the name of an assignee, was held maintainable. "If," said HOLROYD, J., "the covenant to insure could be considered as a covenant to pay a collateral sum to the lessor, the present action [being in the name of the assignee, H. G. W.] could not be supported; but, taking that covenant together with the stat. 14 Geo. 3, c. 78, I think that the

sum insured is not to be considered as a collateral sum, but as a sum which by operation of law must be laid out on the premises. It is, therefore, a covenant to do a matter which concerns the land, and falls within the rule laid down in Spencer's Case, 5 Coke, 17, and by LORD CHIEF JUSTICE WILMOT, in Bally v. Wells, 3 Wils. 25. He there lays down the rule thus: "Covenants in leases extending to a thing *in esse*, parcel or demise, run with the land, and bids the assignee though he be not named, as to repair, &c. And if they relate to a thing not *in esse*, but yet the thing to be done is on the land demised, as to build a new house or wall, the assignees, if named, are bound by the covenants; but if they in no manner concern or touch the thing demised, as to build a house on other land, or to pay a collateral sum to the lessor, the assignee, though named, is not

mill," "a factory," &c., the covenant requires the tenant to keep the fixed machinery therein insured, necessary to the operation of the mill or factory, but not tools or machinery not affixed to the freehold.¹ If the covenant is both to repair and to insure the premises, the tenant, in case the premises are destroyed by fire, is bound to re-instate them as they were when he leased them, and is not excused therefrom because the amount recovered from the insurance is insufficient for that purpose, nor does he answer the covenant by simply expending the insurance money to that end.² A tenant or person in possession, as a mortgagee, is not entitled to charge the landlord for premiums paid for insurance, in the absence of any provision to that effect in the lease or mortgage;³ unless the landlord has been guilty of fraud, or has misled the tenant in reference to the insurance, a court of equity will not relieve a tenant from a forfeiture arising from a breach of a covenant to insure.⁴

bound by such covenants; or if the lease is of sheep or other personal goods, the assignee, though named, is not bound by any covenant concerning them. The reasons why the assignees, though named, are not bound in the two last cases, are not the same. In the first case it is because the thing covenanted to be done has not the least reference to the thing demised; it is a substantial, independent agreement, not *quodam modo*, but *nulla modo*, annexed or appurtenant to the thing leased. In the case of the mere personalty the covenant doth concern and touch the thing demised; but it is to restore it, or the value at the end of the term; but it doth not bind the assignee, because there is no privity as there is in the case of realty between the lessor and lessee and his assigns in respect of the reversion; it is merely collateral in one case; in the other it is not collateral, but they are total strangers to one another without any line or thread to unite or tie them together; and to constitute that privity which must subsist between debtor and creditor to support an action." After citing several cases he further says: "All these cases

clearly prove that concurrent covenants, and such as tend to the support and maintenance of the thing demised, where assigns are expressly mentioned, follow the reversion and the lease, let them go where they will." In *Lynch v. Darrell*, cited in the *Sadlier's Co. v. Badcock*, 2 Atk. 577, where the stat. 14 Geo. 3 did not apply, it was held that the covenant to insure did not inure to the benefit of the assignee. See *Masury v. Southworth*, 9 Ohio St. 340, where it was held that a covenant to insure, where the money is to be expended in reinstating the building, runs with the land; also, *Thomas v. Van Kaff*, 6 G. & J. (Md.) 372, where a similar doctrine was held.

¹ *Mayhur v. Hardesty*, 8 Md. 479.

² *Digby v. Atkinson*, 4 Camp. 275. "The covenant to insure," said LORD ELLENBOROUGH, in the case last cited, was introduced for the security of the landlord, leaving the tenant still absolutely liable on his covenant to repair."

³ *Bellamy v. Brickenden*, 2 Johns. & H. 137; *Brooke v. Stone*, 34 L. J. Ch. 251.

⁴ *White v. Warner*, 2 Mer. 459; *Gregory v. Wilson*, 9 Hare, 683;

SEC. 318. *Covenant to insure where no loss has occurred.*—*Charles v. Altin.*—In an action for breach of this covenant, the plaintiff, who had himself paid the insurance premium, was held entitled to recover it back from the defendant as damages, no special loss having occurred.¹ In this case the plaintiff was himself a lessee, bound by covenant to insure, and the defendant was his assignee, who had taken subject to the original covenants, so that the payment by the plaintiff was necessary for his own safety. Even in the ordinary case of lessor and lessee, the same rule would, it is conceived, hold good. If the plaintiff has paid the insurance premiums, he ought to recover their amount; because, as he is entitled to the protection of an insurance policy, he is also entitled to adopt such means as may keep it on foot. If, however, he has not paid the premiums, then the question is, how much is the reversion the worse by reason of the lapse or non-existence of such a policy, no loss having as yet occurred? The answer to this would seem to be, that the loss to the reversion is measured by the amount which it would cost the plaintiff to put himself into the same position as he would now be in, had the defendant kept his contract. If no insurance has been effected, this amount would consist of the cost of entering into one; that is, all the charges which a party has to incur at starting, before his next premium falls due. If a policy has been effected, then the arrears of premiums (if the office will accept them), or the cost of a new policy, whichever is cheaper. It seems plain that this is all to which the plaintiff is entitled; he can claim nothing in respect of the past risk, for this is over, nor in respect of past payments, for he has made none. The cost of commencing an insurance will, at any moment, secure him against risk till default made in paying the premiums; and when this takes place, he may pay them himself, and recover their amount as damages.

These views are to a considerable extent confirmed in

Meek v. Carter, 4 Jur. N. S. 992; 83; *Mayne on Damages*, Wood's
Green v. Bridges, 4 Sim. 96. ed. 374-377.

¹ *Hey v. Wyche*, 12 L. J. Q. B.

a case where the question incidentally arose. It was agreed by the terms of a charter-party, that the charterers should pay one-third of the freight in advance—the same to be returned if the vessel did not reach her destination—the charterers to insure the amount at the owner's expense, and deduct the cost of so doing from the first payment of freight. The charterers paid the one-third freight, deducting insurance premium. The vessel and cargo never arrived. The charterers sued for a return of the freight. The owners pleaded that if the insurance had been properly effected, it would have indemnified them against the loss of the one-third freight stipulated to be returned; but that by the negligence of the charterers in deviating from the usual course of business in effecting the insurance, the insurance had become worthless; consequently, that the defendants had a right of action against the plaintiffs to exact the same amount as that which the plaintiffs had against them. This, if true, would have made the plea good, in avoidance of circuity of action. It was held bad, on the ground that damages for negligence in insuring were not necessarily the same as the freight to be returned. MAULE, J., said: "I do not think that the concluding allegation sufficiently identifies the sum mentioned in the plea with that sought to be recovered by the declaration. That which is complained of in the plea would give the defendants a right of action against the plaintiffs, so soon as they were guilty of the negligence charged, and the defendant was thereby damnified. That which happened subsequently does not necessarily determine the amount of damages the defendant would be entitled to. A jury might have given exactly the same amount of damages before as after the loss. The question is, what damage has the party sustained at the time the cause of action vested in him? If nothing had happened, and a policy might then have been effected, the jury would consider what was probable; if the loss had then happened, they perhaps might have given the full amount; but they were not bound to do so. There were a variety of circumstances which they might prop-

erly take into their consideration. Therefore, it is not a necessary and conclusive thing that the sum be insured by the policy, neither more nor less, is the sum which the plaintiffs would have to pay; but a compensation for the injury resulting from their negligence." "Perhaps, after the loss, they would be bound not to give more than the amount of the actual loss, when no greater loss could happen."¹ It will be observed that it was not necessary for the court to lay down positively what the measure of damages would be, where the action was brought before a loss had arisen. It was sufficient for their purpose to show that they were not *necessarily* the full amount of the policy.² This will account for the absence of any direct and positive assertion as to the rule of law in such a case.

SEC. 319. *Where a loss has occurred.*—There seems, on principle, no reason to doubt that, *after* a loss had occurred the measure of damages would be the exact value of the thing lost, which ought to have been insured. A later case expressly decides the point. R, the owner of a saw-mill, received from B timber to be sawed. An agreement was made as to its being kept insured by R, as to which varying evidence was given. According to one account, the agreement was, that R should hold all B's timber insured from fire, and should pay its value if burnt. According to another account, the whole substance of what passed as to insurance was that the goods should be always insured from fire. No written memorandum was made—no particular office was mentioned—no time for insurance was mentioned, nor any particular amount. No insurance was effected. The goods were burnt, and R became bankrupt. B applied to prove for the value of the timber. His right depended upon the question, whether his claim was for an ascertained amount, or for unliquidated damages. It was decided on appeal to the lord justices that his claim was admissible. The court held that on the whole evidence they were satisfied that there was

¹ Charles v. Altin, 15 C. B. 46, 65.

² So in Cahill v. Dawson, 3 C. B. (N. S.) 106.

a contract on the part of the bankrupt to make good the value of the timber. L. T. TURNER, however, added: "In any event, it seems to be clear that there was a contract on the part of the bankrupt to insure the petitioner's timber, and that this insurance was to be made for the purpose of securing to the petitioner the value of his timber, in case it should be destroyed by fire; and, under such circumstances, I apprehend that the value of the timber would be the measure of damages in an action for breach of the contract." This being so, and the value of the timber being an ascertained thing in the market, the amount of the claim of course became a mere matter of account.¹ Where a lessee of real and personal property, covenanted to keep the personal property insured for the benefit of the lessor and he fulfills this covenant, the lessee is relieved, by destruction of all the leased property by fire, from the subsequent payment of any rent, although he has covenanted to keep the premises in repair.²

The fact that the landlord keeps the tenant out of possession, or that the premises are held by a tenant under a prior lease that has not expired, although not an eviction, is equivalent thereto, and affords a good defence to an action for the rent;³ but the fact that the premises are in the possession of a third person who holds without right, and refuses to let the tenant in, affords no ground of defence.

¹ *Ex parte Bateman*, 20 Jur. 265. Approved by EARLE, C. J., in *Betteley v. Stainsby*, 12 C. B. (N. S.) 499. In Upper Canada it has been on this principle laid down that the measure of damages is the value of the premises lost to the plaintiff by the neglect to insure, not ex-

ceeding the sum in which the defendant was to have insured by his covenant.

² *Whitaker v. Hawley*, 15 Kan. 674; 37 Am. Rep. 277.

³ *Douglas v. Murphy*, 16 Upper Canada, Q. B. 118.

CHAPTER XXXIII.

.COVENANT NOT TO ASSIGN OR UNDERLET.

- SEC. 820. Generally.
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- SEC. 822. Assignments generally.—Nature of.
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- SEC. 848. Rights and liabilities of assignee as against lessee.
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- SEC. 850. Grant by the landlord of his reversion.

SEC. 351. Conveyances good without attornment of tenant.

SEC. 352. Effect of death of the lessor.

SEC. 353. Death of lessee.

SEC. 320. Generally.—A covenant not to assign or underlet the leased premises without the assent of the lessor is frequently inserted in a lease, and is regarded as fair and reasonable covenant,¹ even though a forfeiture is provided in case of its breach.² But a license once given removes the restriction forever, as the condition is treated as entire, and therefore not capable of being waived or released as to part,³ and this is the rule whether

¹ *Folkingham v. Croft*, 8 *Anst.* 700; *Morgan v. Slaughter*, 1 *Esp.* 8. Where there is no restraining clause in the lease, the lessee may assign or underlet without the assent of the lessor, or even against his protest, and this to, whether the word "assigns" is used or not. *Robinson v. Perry*, 21 *Ga.* 183; *Greenway v. Adams*, 12 *Ves.* 395; *Saffan v. Naglee*, 9 *Cal.* 662. And even when such restraint is imposed in the lease it is not regarded with much favor by the courts, *Cooney v. Hayes*, 40 *Vt.* 478; *Church v. Brown*, 15 *Ves.* 265; *Crusoe v. Bugby*, 1 *W. Bl.* 766, and when the covenantee has once given his assent to an assignment the restriction is gone forever. *Chipman v. Emeric*, 5 *Cal.* 49. And even a verbal agreement to accept an assignee as tenant, acted upon, is good. *Lovering v. Langley*, 8 *Minn.* 107. But in England by Stat. 23 and 28 *Vict.*, c. 85, s. 1, a license is operative only in the special instance, and does not remove the restriction so that there can be no subsequent breach.

² *Haberdasher's Co. v. Isaac*, 3 *Jur. N. S.* 311.

³ *Dumpor's Case*, 4 *Coke*, 119 b; *Chipman v. Emeric*, 5 *Cal.* 49; *Co. Litt.* 219 b; *Noy*, 32. And the assignee may re-assign without special license or assent from the lessor. *Whitcot v. Fox*, *Cro. Jac.* 898; *Murray v. Haraway*, 56 *N. Y.* 337; *Seifke v. Koch*, 8 *How. Pr. (N. Y.)* 333. And the rule is generally recognized that when a condition has once been dispensed with or waived it cannot subse-

quently be enforced as a condition, although it may perhaps, in some instances, be made the ground of an action upon the covenant. *Merrifield v. Cudleigh*, 4 *Cush. (Mass.)* 178; *Dakin v. Williams*, 17 *Wend. (N. Y.)* 447; *Dickey v. McCullough*, 2 *W. & S. (Penn.)* 88. But a distinction exists when the obligation imposed is continuous. Where the covenant is continuous a waiver extends only to particular or antecedent breaches, and does not relieve him from the effects of a subsequent breach: as, where the tenant covenants to cultivate the lands in a certain way, or to insure to a certain amount, &c., by accepting rent, or expressly, the landlord may waive a past breach, but such waiver does not relieve the tenant from any subsequent breach. Notwithstanding such waiver, the tenant must thereafter perform his covenants. *Doe v. Gladwin*, 6 *Q. B.* 953. But a covenant not to assign is not a continuous covenant. When once broken the consequences are entailed, and if the landlord waives the breach he is forever after without a remedy, except, as previously stated, it is by action upon the covenant. *Dickey v. McCullough*, ante. The same rule, applicable in the case of a condition, applies to a penalty, and, if a person has put himself in a situation that he cannot claim the whole penalty, he can claim no part of it. It is laid down in 1 *Rolle's Abr.* 471, and I am not aware that the principle has ever been controverted, that "if a man

the license is general, or is restricted to a particular individual;¹ but, in order to have that effect, it must be such a license as is contemplated in the lease. That is, if the lease provides that the license shall be in writing, an oral license is not good, and does not operate to destroy the covenant;² nor does a license given by one not vested with authority to give it, although he was at the time owner of the estate.³ The license should expressly forbid the lessee from parting with the possession until a complete transfer of the legal interest has been effected. The practice of letting a purchaser into possession before the legal estate is transferred, is, however, so common, that, if it is intended to forbid it, such intention must be clearly expressed.⁴ A covenant by the lessor not to withhold his license to assign unreasonably or vexatiously, is broken by his refusing his license to assign to an unobjectionable person, in order that he may obtain a surrender of the lease for the purpose of rebuilding.⁵ Where the lease contains a provision against assignment, &c., except in a particular way, as by will, the tenant may assign, &c., in that way, but in no other, because the original restriction as to alienation contains an exception out of it, so that in the mode excepted there was nothing to license. The exception in such a case not only extends to the lessee himself, but also to his assignee or lessee,

is bound to make an house *and the obligee discharges him of a single post*, he is discharged of all."

While a license to assign removes the restriction *in toto*, Murray v. Murray, 56 N. Y. 837; Chipman v. Emeric, 5 Cal. 49; Jones v. Jones, 12 Ves. 189; Masher v. Foundling Hospital, 1 V. & B. 191; Dakin v. Williams, 1 Wend. (N. Y.) 458; Paul v. Nurse, 8 B. & C. 496; Williams v. Earle, 9 B. & S. 740; West v. Dobb, 9 id. 755, and if there are several lessees a license to one discharges the condition as to all, Leeds v. Compton, 1 Roll's Abr. 472, or if a license is given to assign *a part* of the premises, the lessee may assign the whole; Leeds v. Compton, ante; yet in order to have that effect the license must be in writing, when such a license is required by the lease. Gregson

v. Harrison, 2 T. R. 490. A license to underlet a part of the premises applies only to the particular instance, and does not discharge or remove the condition as to the remainder. Gregson v. Harrison, ante.

¹ Brummel v. McPherson, 14 Ves. 172.

² Richardson v. Evans, 8 Madd. 218; Roe v. Harrison, 2 T. R. 425; Masher v. Foundling Hospital, 1 V. & B. 191. But where the lessee has, in good faith, acted upon such parol license, a court of equity would restrain the lessor from enforcing a forfeiture. Richardson v. Evans, ante.

³ Read v. Farr, 6 M. & S. 121.

⁴ West v. Dobb, L. R., 4 Q. B. 634.

⁵ Lehmann v. McArthur, L. R., 3 Eq. 746.

and they may alienate in that, but not in any other mode.¹ An assignment, even when expressly forbidden by the lease, and when, by the terms of the lease, a forfeiture is provided for its breach, is nevertheless valid, and passes the estate to the assignee subject to the consequences of the breach,² and the landlord may waive the forfeiture, either expressly or impliedly, by personally accepting rent that accrues *subsequent* to an assignment, *knowing the fact that an assignment has been made*;³ but mere proof of the acceptance of rent that accrued subsequent to the assignment, does not relieve the term from the forfeiture; *it must also be shown that at the time when such was received the landlord was aware of the assign-*

¹ Lloyd v. Crisp, 5 Taunt. 249.

² Goodright v. Davies, Cowp. 808; Brummell v. Macpherson, ante. The assignment, without the approbation of the lessor, of a lease which contains a covenant that the lessee will not lease, underlet, nor permit any other person to occupy without such approbation, does not determine the lease without re-entry by the lessor; nor enable the lessor to maintain an action for use and occupation against one occupying part of the premises under the assignee before such re-entry. Shattuck v. Lovejoy, 8 Gray (Mass.) 204. Where the lease is assigned *with his consent* the assignee is not liable for any breaches by the assignor either before or after assignment. Townsend v. Scholey, 36 Cal. 18.

³ Gregson v. Harrison, 2 T. R. 425; Godb. 47. In Cheny v. Batten, Cowp. 243, ASTRON, J., said: "Where an ejectment has been brought for the forfeiture of a lease, * * acceptance of the rent afterwards by the landlord has, I believe, been held a waiver of the forfeiture of the lease; which may well be, *for it is a penalty*, and by accepting the rent, the party waives the penalty." In Goodright v. Davies, Cowp. 808, where the lease contained a condition for a forfeiture if the tenant should underlet, the landlord, with full knowledge of the underletting, accepted subsequently accruing rent. LORD MANSFIELD said:

"This case is extremely clear. To construe this acceptance of rent, *due since the condition broken*, a waiver of the forfeiture, is to construe it according to the intention of the parties. Upon the breach of the condition the landlord had a right to enter. He had full notice of the breach, and does not take advantage of it; but accepts rent subsequently accrued. That shows he meant that the lease should continue. Cases of forfeiture are not favored in law; and where the forfeiture is once waived the court will not assist it." Acceptance of rent by an agent, the agent knowing the facts, *does not operate as a waiver by the landlord*. Jackson v. Schutz, 18 John. (N. Y.) 174. As stated by LORD MANSFIELD, ante, the courts do not favor forfeitures, and therefore adhere strictly to the precise words of the condition in order to prevent a forfeiture, and if the landlord has manifestly done any act that is inconsistent with his reliance upon it, or which amounts to a waiver of it, they will not permit him to enforce it, and acceptance of rent with full knowledge of the facts is such an act as amounts to a waiver; but if he had no notice or knowledge of the fact it would be absurd to hold that he had waived a breach he had never heard of. Bacon's Abr. Tit. Leases (T) 2; Jackson v. Brownson, 7 John. (N. Y.) 227.

ment.¹ the receipt of rent accruing *before* the forfeiture attached, does not operate as a waiver of the forfeiture.² Not only does the acceptance of rent, as previously stated, operate as a waiver of a forfeiture, but also *any act of the landlord that evinces an intention upon his part that the lease shall continue notwithstanding the forfeiture,*³ and his *intention* is a question for the jury,⁴ *but the legal effect of his acts upon the facts found is for the court.*⁵ But it was formerly held that, where there is a provision that in case the tenant shall assign or underlet, *the lease shall be void*, neither an acceptance of rent or any other similar act upon the landlord's part could operate as a waiver, *because from the time of the happening of the breach there is no lease existing between the parties,*⁶ and that it was only when the lease is voidable merely, and not absolutely void, that a waiver could be set up,⁷ although it was held

¹ *Gregson v. Harrison*, 2 T. R. 425; *Camp v. Pulver*, 5 Barb. (N. Y.) 91; *Walker v. Engler*, 80 Mo. 180; *Jones v. Clark*, 1 Den. (N. Y.) 517; *McKildoe v. Darracott*, 18 Gratt. (Va.) 278; *Clark v. Cummings*, 5 Barb. (N. Y.) 839; *Newman v. Rutter*, 8 Watts (Penn.) 51.

² *Hunter v. Osterhout*, 11 Barb. (N. Y.) 100; *Jackson v. Allen*, 8 Cow. (N. Y.) 220.

³ *Rutson v. Lewis*, 5 Ad. & El. 277. In *Morecraft v. Meux*, 1 C. & P. 346, the jury found that the landlord accepted the rent after ejectment brought, and without intending to discharge the forfeiture, but upon exceptions, it was held that by accepting the rent he waived the forfeiture. *Doe v. Meux*, 4 B. & C. 606.

⁴ *Cheney v. Batten*, Cowp. 248. Opinion of ASHURST, J.

⁵ *Morecraft v. Meux*, ante.

⁶ *Pennant's Case*, 8 Coke, 64; *Simpson v. Butcher*, Doug. 51; *Coon v. Brackett*, 2 N. H. 164; *Mulcarray v. Eyres*, Cro. Car. 511; *Browning's Case*, Plowd. 184; *Finch v. Throckmorton*, Cro. Eliz. 221; *Parmalee v. Oswego R. R. Co.*, 4 N. Y. 74.

⁷ *Symson v. Butcher*, Doug. 51; *Carter v. Strapham*, 1 Cowp. 201; *Yale v. Church*, 2 id. 488. "Where," says LORD COKE, 1 Inst. 214 b, "the estate or lease

is *ipso facto void* by the condition or limitation, no acceptance of the rent after can make it to have a continuance, otherwise it is of a lease or estate voidable by entry," and this doctrine is also laid down in *Pennant's Case*, ante, with equal force. In that case it was resolved that "where the condition is, that on breach thereof the lease for years shall be void, acceptance of rent due at a subsequent day will not affirm it" (3d resolution). See also, *Bacon's Abr. tit. Leases (T)*, 2, where it is said, "When we say that a forfeiture may be waived, we must be understood to confine ourselves to those cases where, by the terms of the contract, the estate, upon the tenant's doing or failing to do what he has stipulated to do or abstain from, is only determinable, not where it absolutely determines; where the lease is only voidable, not where it is absolutely void." *Kennensley v. Orpe*, Doug. 56. In the one case the forfeiture is optional with the lessor, and, unless he sees fit to rely upon and enforce it, no forfeiture is actually incurred; but in the other case, by the breach, the lease is at once put an end to; without the exercise of any option by the lessor, it becomes a nullity and cannot be received by any act of the lessor short of an actual renewal of the con-

that if the landlord permitted the tenant to remain after the breach, and accepted rent from him, a tenancy from year to year sprung up upon the terms of the lease, so far as they were applicable to such a tenancy.¹ But latterly the courts are inclined to hold that the landlord may elect whether to treat the lease as void or not, and, while the tenant has no option in the matter, and cannot set up his own breach to defeat the lease, yet the landlord may, if he elects to do so, treat it as valid, even after breach, and enforce all of its provisions as against the lessee:² but he is bound by his election, and after having once elected by some decisive act to treat the lease as void, he cannot afterwards enforce it against the tenant as a valid instrument.³

tract, as the lessee from the time of the breach ceases to have any interest upon which the will of the lessor can attach. 4 Bacon's Abr. tit. Leases (T), 2. But there is a distinction in reference to the application of this rule between leases for years and leases for life or lives. In cases of the latter class, although the lease provides that for a certain breach it shall be void, still, in law, it is treated merely as voidable by re-entry upon the principle that an estate that begins by livery can be ended only by entry. *Beston's Case*, Plowd. 183; *Doe v. Pritchard*, 5 B. & Ad. 765; *Bowen v. Bowen*, 18 Conn. 585; *Marwick v. Andrews*, 25 Me. 525; *Spear v. Fuller*, 8 N. H. 174; *Fifty Associates v. Howland*, 11 Met. (Mass.) 99; *Garrett v. Scanten*, 8 Den. (N. Y.) 384; *Hamilton v. Elliott*, 5 S. & R. (Penn.) 375. And even in a lease for years, although there is a condition that it shall be void upon a certain breach, yet the tenant cannot avail himself of such breach to avoid the lease, as in that case he would be permitted to avail himself of his own wrong to rid himself of a contract of which he had become anxious to relieve himself. *It is void only at the option of the landlord*, *Reed v. Farr*, 6 M. & S. 121; *Hyde v. Watts*, 12 M. & W. 254; *Doe v. Bancks*, 4 B. & Ald. 401; *Jones v. Carter*, 15 M. & W. 718, and if he elects to treat it as a

valid lease, by any decisive act, after breach, and cognizant of it, as by receiving subsequent rent, he is estopped from enforcing the forfeiture except upon a fresh breach. *Bryan v. Bancks*, 4 B. & Ald. 401.

¹ *ALDERSON, B.*, in *Nash v. Birch*, 1 M. & W. 407; *Bruns v. Rawlins*, 10 East, 261; *Martin v. Watts*, 7 T. R. 88.

² *Cartwright v. Gardner*, 5 Cush. (Mass.) 273; *Jones v. Carter*, 15 M. & W. 718; *Clark v. Jones*, 1 Den. (N. Y.) 517; *Western Bank v. Kyle*, 6 Gill. (Md.) 718.

³ *Jones v. Carter*, 15 M. & W. 718. "Although the lease is declared to be void for breach of covenant," says *PARKE, B.*, in *Jones v. Carter*, ante, "it is perfectly well settled that the true construction of the proviso is, that it shall be void at the option of the lessor. *Rode v. Farr*, 6 M. & S. 121; *Bryan v. Bancks*, 4 B. & Ald. 401. And consequently on the one hand, if the lessor exercises the option that it shall continue, the lease is rendered valid; if he elects that it shall end, the lease must be determined. In the case above referred to the option was held to have been exercised by the receipt of rent, subsequently due, and the lease thereby rendered valid. In like manner, the lease would be rendered invalid by some unequivocal act indicating the intention of the lessor to avail

SEC. 321. *How broken.*—As previously stated, covenants against assignment or underletting are not favorably regarded by the courts, and are construed liberally in favor of the lessee, and so as to prevent the restriction from extending beyond the express stipulations in reference thereto, and in accordance with this tendency it is held, that a condition not to assign is not broken by an underlease¹ unless there are special words, as, that the

himself of the option given to him, and notified to the lessee, after which he could no longer consider himself bound to perform the other covenants in the lease; and if once rendered void, it could not again be set up. An entry, or ejectment, in which an entry is admitted, would be necessary in the case of a freehold lease, or of a chattel interest, where the terms of the lease provided that it should be avoided by re-entry. In *Bryan v. Banks*, ante, ejectment was brought upon a lease of coal mines in which a royalty rent was reserved upon every ton of coal raised. The lease contained a provision that it should be void to all intents and purposes if the tenant should cease working at any time for two years. After the working had ceased for more than two years the lessor received rent. It was held that a tenancy from year to year was not thereby created, for the lease, by such breach did not become absolutely void, but only voidable at the option of the lessor, and that he might avoid the lease upon any cesser to work commencing two years before the day of demise in the ejectment. "I think," says BAYLEY, J., "that the landlord has it in his election to make this lease void or not; that he is not bound to exercise his election in the first instance; and that though he may waive it from time to time, he is at liberty afterwards to insist on the forfeiture in respect of subsequent misconduct." See also upon the latter point, *Boscowen v. Bliss*, 4 Taunt. 785.

¹ *Blencowe v. Bugby*, 3 Wils. 224; *S. C. Crusoe v. Bugby*, 3 Bl. 766. But if the tenant parts with the demised premises for the whole of his term, although his deed purports to be an underlease, yet it is

in legal effect an assignment, and operates as a breach of his covenant. *Wollaston v. Hakewell*, 3 M. & G. 297; *Hicks v. Downing*, 1 Ld. Rayd. 99; *Langford v. Selmes*, 3 Koy. & J. 220; *Palmer v. Edwards*, 1 Doug. 187; *Pascoe v. Pascoe*, 8 Bing. N. C. 898; *Parmer v. Webb*, 8 Taunt. 593; *Thorn v. Woolcombe*, 3 B. & Ad. 595; *Preece v. Corrie*, 5 Bing. 24; — *v. Cooper*, 3 Wils. 375. Underletting does not operate as a breach of a covenant "not to assign" merely, *Kinnerly v. Orpe*, 1 Doug. 183; *Brewer v. Hill*, 1 Anst. 418; *Church v. Brown*, 15 Ves. 295; *Jalabret v. Duke of Chandos*, 1 Eden, 372, but a covenant not to underlet is broken by an assignment. *Berry v. Taunton*, Cro. Eliz. 381; *Greenway v. Adams*, 12 Ves. 395; *Den v. Post*, 25 N. J. L. 285; *Bemis v. Wilder*, 100 Mass. 446; *Shattuck v. Lovejoy*, 8 Gray (Mass.) 204; *Shumway v. Collins*, 6 id. 237; *Blake v. Sanderson*, 1 id. 333, but in *New York*, *Lynde v. Hough*, 27 Barb. (N. Y.) 415, and in *New Jersey*, *Field v. Mills*, 83 N. J. L. 254, the doctrine of the English cases is rejected, and an assignment is held not to operate as a breach of a covenant not "to let or underlet." Of course the language of the covenant must be looked to, to determine whether an underlease operates as a breach of a covenant not to assign. Thus, when the covenant is that "the lessee shall not assign or otherwise part with the indenture of lease, or the premises, for the whole or any part of the term," an underlease would operate as a breach, and if there is a right of re-entry reserved, would work a forfeiture, *Holland v. Worsley*, 1 Camp. 1; *Granger v. Grovenor*, 8 Dy.

lessee, his executors, &c., shall not assign, let, &c.,¹ in which case neither the lessee nor his executors, &c., can underlet.² But an underlease operates as a breach if the lease contains a proviso that it shall be void "if the lessee assigns or otherwise parts with the indenture of lease, or the premises thereby demised, or any part thereof," for the whole or any part of the term,³ or if any words are used in the condition that operate as a limitation in that respect.⁴ But an assignment by operation of law does not operate as a breach of the condition, as, if the lessee's interest under the lease is set off or sold under a *bona fide* execution.⁵ Nor does any involuntary assignment of the

808 b, n. 75. But even when the covenant is against either assigning or underletting, and there is nothing restraining the tenant from parting with the possession, merely putting a person into possession does not operate as a breach, *Church v. Brown*, 15 Ves. 265; *Williams v. Cheney*, 3 id. 61, nor is a covenant not to part with the possession broken by parting with the possession of a part of the premises, *Church v. Brown*, ante; *Collins v. Sillye*, Sty. 265, nor even when the lessee covenants not to assign or underlet any part of the premises, is the covenant broken by letting out rooms to lodgers, the tenant still retaining control of the premises. *Pitt v. Laming*, 4 Camp, 78. But, possibly the doctrine of the last case must be restricted to the letting of buildings for a purpose that necessarily involves the letting of rooms to lodgers; *Greenslade v. Tapscott*, 1 C. M. & R. 35; and it has been held that such would be the result when the language of the covenant was such as impliedly to exclude such a letting. *Ambler v. Woodbridge*, 9 B. & C. 376. If the covenant is merely personal, and the words "administrators, executors, &c.," are not used, the restraint is removed upon the death of the lessee. *Gregson v. Harrison*, 2 T. R. 425; *Anonymous*, 1 Dyer, 66 a, pl. 8. But if the covenant extends to executors, administrators, &c., they are bound by it, and cannot

assign even to pay debts. *Lloyd v. Crispe*, 5 Taunt. 249; *Williams v. Davies*, 6 C. & P. 614; *Northcote v. Duke Ambler*, 511; *Gregson v. Harrison*, ante; *Goodbehere v. Bevan*, ante; *Bridgman v. Davies*, 1 C. M. & R. 405. But in the latter case, where the term is assigned for the payment of debts, equity will relieve against the forfeiture. *Cox v. Brown*, 1 Rep. no Ch. 170; *Leers v. Hind*, 1 Ves. Jr. 294; *Northcote v. Duke*, ante; *Burleton v. Humfrey*, Ambler, 258.

¹ *Gregson v. Harrison*, 2 T. R. 426.

² *Dingley v. Sales*, 1 M. & S. 297. A covenant not "to assign, transfer, set over or otherwise do or put away the lease or premises," is not broken by underletting them. *Jackson v. Harrison*, 17 John. (N. Y.) 66; *Jackson v. Silvernail*, 15 id. 278; *Copeland v. Palmer*, 4 Mich. 660; *Hargrave v. King*, 5 Fred. (N. C.) Eq. 430. But an underlease operates as a breach of a covenant not "to set, let or assign over" the premises. *Gregson v. Harrison*, 2 T. R. 425; *Dingley v. Sales*, ante.

³ *Holland v. Worsley*, 1 Camp. 20.

⁴ *Holland v. Worsley*, ante.

⁵ *Mitchinson v. Carter*, 8 T. R. 57. But it was held, upon a hearing of this case at Trinity Term, 8 T. R. 800, that, if a tenant under a covenant not "to let, set, or assign, transfer or make over, &c.," gives a warrant of attorney to confess judgment to a creditor for the express purpose of enabling

lease operate as a breach of the covenant, as the death¹ or involuntary bankruptcy of the lessee,² or in any wise by the mere operation of law.³ Nor is the condition

the creditor to take the lease upon execution, such act of the tenant is in fraud of the covenant, and that the landlord may recover the premises in ejectment from the purchaser under the execution. "Here," says GROSE, J., "the tenant did not, in terms, assign the lease, but he did that which was equivalent; it was an attempt to evade the covenant, and was intended as a fraud on the landlord." "If," says LORD KENYON, C. J., in the same case, "the lease had been taken by the creditor under an adverse judgment, the tenant not consenting, it would not have been a forfeiture," Stanhope v. Skeggs, E. & Tr., 21 Geo. 3 B. R.

¹ Seers v. Hind, 1 Ves. Jr. p. 295; Roe v. Harrison, 1 T. R. 425; Croft v. Lumley, 6 H. L. Cas. 673.

² Doe v. Bevan, 8 M. & S. 353; Hunter v. Galliers, 2 T. R. 133; Goodbehare v. Bevan, 8 M. & S. 353; Weatherall v. Geering, 12 Ves. 512; Wadham v. Marlow, 8 East, 314, n.; Dyke v. Taylor, 6 Jur. N. S. 1329; Lockwood v. Clarke, 8 East, 185; Goring v. Warner, 2 Eq. Cas. Abr. 100 pl. 3; S. C. 7 Vin. Abr. 85 pl. 9. But taking the benefit of an Insolvency Act is treated as a voluntary assignment, and such would doubtless be the effect where a person becomes a bankrupt on his own petition. Shee v. Hale, 18 Ves. 404; Holland v. Cole, 1 H. & C. 67; Hill v. Cawdry, 1 H. & N. 360; Billiter v. Young, 6 E. & B. 1. And a lease may expressly provide that it shall be void if the lessor becomes bankrupt. Lloyd v. Ingleby, 15 M. & W. 465; Church v. Brown, 15 Ves. 258; Griffiths v. Pritchard, 5 B. & Ad. 765; Williams v. Davis, 6 C. & P. 514; Bridgman v. David, 16 M. & R. 405; Gatehouse v. Rees, 4 Bing. N. C. 384. Where the lessee becomes a bankrupt (not on his own petition), and by the operation of the bankrupt acts.

³ Goring v. Warner, ante; Slipper v. Tottenham, &c., Ry. Co., L. R., 4 Eq. 112; Sir William Moore's Case, Cro. Eliz. 26; Crusoe v.

Bugby, 3 Wils. 234; Mitchinson v. Carter, 8 T. R. 57; Stanhope v. Skeggs, 2 id. 428; Weatherall v. Geering, 12 Ves. 513; Shee v. Hale, 18 Ves. 404; Brandon v. Astor, 2 Y. & C. 24, the property becomes vested in the assignees, such transfer of interest does not create a breach of the contract against alienation. Wadham v. Marlow, 2 Chit. 600; 8 East, 314 n. Nor even a subsequent assignment by them to a purchaser. Goodbehare v. Bevan, 8 M. & S. 353, 360, 361; Cole Ejec. 436. But see Dyke v. Taylor, 6 Jur. N. S. 1329. The assignment being done by the authority of a statute, supersedes any private agreement between the parties, and is, therefore, no breach of the condition. Hunter v. Galliers, 2 T. R. 133; Weatherall v. Geering, 12 Ves. 512; Lockwood v. Clarke, 8 East, 185; Goodbehare v. Bevan, 8 M. & S. 353. But if he became bankrupt upon his own petition that may amount to a voluntary assignment, and consequent forfeiture. Hill v. Cowdery, 1 H. & N. 360; Billiter v. Young, 6 E. & B. 1; Holland v. Cole, 1 H. & C. 67. A lease may be made subject to a proviso for re-entry by the lessor, in the event of the lessee becoming bankrupt; and such proviso will be valid as against his assignees. Where A granted a lease to B, which contained a covenant that B, his executors or administrators (without mentioning "assigns"), should not underlet without the consent of the lessor; and B having become bankrupt, his assignees assigned the premises to C, from whom B, after he obtained his certificate, took them again by re-assignment, and underlet them to another person; it was held, that B, having been discharged at the time of his bankruptcy from all covenants in the lease, the underletting by him, which was in the character of assignee, was no forfeiture of the lease, Cheere v. Smith, 5 Taunt. 795. Taking the benefit of an insolvent act is considered as a voluntary assignment; and therefore

broken by a bequest of the term,¹ nor by simply depositing the lease with a creditor as security for a debt,² or otherwise parting with the possession of the lease, when no transfer is executed so as to make the party receiving it liable upon the covenants of the lease as assignee;³ nor even an assignment which is void in law,⁴ nor by the marriage of a *feme sole* tenant;⁵ nor does the tenant violate this condition by a mere offer to assign, as by advertising that he will underlet or assign. There can be no breach unless he does in fact assign or underlet in a manner that is operative and effectual in law.⁶ If a man leases a house and land, upon condition that the lessee shall not *parcel out the land, nor any part thereof*, from the house; and afterwards the lessee leases the house and part of the land to one, and the residue of the land to another, it is a breach of the condition; for by the word "parcelling" is intended a division or separation of the land from the house; and every division and severance of the house and land is within the meaning of the condition.⁷ Where a lease contained a proviso for re-entry, in case the tenant should *demise, lease, grant or let* the demised premises, or any part or parcel thereof, or convey, &c., to any person whomsoever for all or any part of the term, without the license of the lessor in writing; and the lessee, without such license, agreed with a person to enter into partnership with him, and gave him the use of a back chamber, and some other parts of the premises exclusively, and of the rest jointly with himself; it was held to be a breach of the contract against aliena-

creates a forfeiture of a lease which contains a covenant against alienation. *Shee v. Hale*, 18 Ves. 404; *Townshend v. Early*, 10 Jur. N. S. 860. So perhaps would be a bankruptcy where the petition for adjudication is presented by the bankrupt himself. So where he assigns all his property to trustees for the benefit of his creditor under the provisions of the act. *Holland v. Cole*, 1 H. & C. 67.

¹ *Fox v. Swann*, Sty. 483; *Doe v. Bevan*, ante; *Crusoe v. Bugby*, ante. But in *Knight v. Mory*, Cro. Eliz. 60, a devise of the term

was held a breach of a condition not to alien, and this is also held in *Burry v. Stanton*, id. 830.

² *Doe v. Bevan*, ante; *Pitt v. Laming*, Ry. & M. 36; *Pitt v. Hogg*, 2 C. & P. 160; *Ex Parte Drake*, 1 M. D. & DeG. 539; *Goodbehere v. Bevan*, ante; *Bowser v. Colby*, 1 Hare, 109.

³ *West v. Dobb*, L. R., 4 Q. B. 684.

⁴ *Lloyd v. Powell*, 5 B. & C. 808.

⁵ *Comyn's Dig. tit. Condition (Q)*.

⁶ *Gourley v. Duke of Somerset*, 1 V. & B. 68; *Ex Parte Cocks*, 2 Deac. 14.

⁷ *Bac. Abr. tit. Condition (O)*.

tion, for which the lessor was entitled to re-enter.' Suffering persons to use portions of the land for the purpose of raising crops without consent, is a breach of a stipulation not to suffer any part of the land to be occupied by any other person, without the consent of the landlord, although it is proved to be the custom of the country for farmers to pursue that course.' Where the covenant was, not to assign the whole or any part of the lands demised without the lessor's consent, and the lessor entered into part himself, and then the lessee assigned; it was held to be a breach of the covenant, notwithstanding the lessor's entry.' Where, during the existence of a lease containing a proviso for re-entry in case of assignment or underletting without license in writing, the lessor, who had purchased the remainder of the interest in it, engaged to grant a new lease to the defendant, who was not the lessee, to take effect on the expiration of the old lease, it was held, that the lessor could not maintain ejectment against the defendant on the fact of his possession, though no license in writing had been granted, as there was a waiver of the forfeiture, if any had taken place, or else there was no forfeiture at all, for the defendant came in with the lessor's consent.' It was at one time held, that where there is a right of re-entry upon assignment or underletting, if a person is found on the premises appearing as tenant, it is *prima facie* evidence of an underletting; and the defendant must show whether the person was a tenant or merely a servant: but it has since been laid down by LORD ELLENBOROUGH, that it is not sufficient to prove the defendant, a stranger, in possession of the demised premises, and his declaration that they were demised to him by another stranger, even if the tenant had covenanted not to part with the possession. Unless otherwise specially provided in the lease, it passes to his executors upon the decease of the lessee, and may be sold by them as personalty, even though it is

¹ Dingley v. Sales, 1 M. & S. 297. But a mere provision against assigning or underletting is not broken by a mere change in the business and letting in a partner. Roosevelt v. Hopkins, 88 N. Y. 81.

² Greenslade v. Tapscott, 1 C. M. & R. 55.

³ Collins v. Sillye, Style, 265.

⁴ Weatherhead v. Curwood, 1 Har. & Wol. 140.

⁵ Hindley v. Rickarby, 5 Esp. 4.

upon condition that he shall not sell without leave, unless the restraint is specially extended to them.¹ So too, if, under an order of a court of competent jurisdiction, the lessee makes an assignment for the benefit of his creditors,² or the lease is sold upon execution or other legal process,³ or whenever the lease passes by operation of law, and not by the voluntary act of the lessee, such a condition is not broken, because it is presumed that the parties intended only to guard against a conveyance by the voluntary act of the lessee;⁴ as, where the lessee is forced into insolvency and the lease passes by operation of the statute or the order of court,⁵ or the land is taken for a public purpose under the provisions of the statute,⁶ or if a *feme sole* lessee marries, the condition is not broken, even though the lease is expressed to be given "only for herself to occupy for a residence," unless language is used that expressly restrains such transfers.⁷ But it is competent for the lessor to restrain even such transfers; but in order to have that effect, there must be an express provision in the lease that clearly prohibits the transfer; as, that "the lease and premises shall not pass by operation of law nor by any species of conveyance by the lessee or any person representing him."⁸ So, too, the restriction may be such as to prohibit *any* transfers by necessary inference; as where the lease is to a person "so long as he shall occupy" the premises, or for ten years, "if he shall continue to inhabit and dwell in the house and actually occupy the land," it was held that the lessee having become bankrupt, and his assignees having sold the lease, and the lessee having quit possession, the lease was forfeited.⁹ It is competent for the lessor to limit the estate

¹ 4 Kent's Com. 130.

² *Shree v. Hale*, 13 Ves. 404; *Goring v. Warner*, 3 Eq. Cas. Abr. 100; *Goodbehare v. Bevan*, 8 M. & S. 353; *Lloyd v. Powell*, 5 B. & C. 308. That a receiver cannot sell in defiance of a restrictive clause, see *Spencer v. Darlington*, 74 Penn. St. 286.

³ *Mitchinson v. Carter*, 8 T. R. 57; *Riggs v. Pinsell*, 66 N. Y. 193.

⁴ *Weatherall v. Geering*, 12 Ves. 513; *Smith v. Putnam*, 3 Pick.

(Mass.) 221; *Stevenson v. Silvernail*, 15 John. (N. Y.) 291; *Wilkinson v. Wilkinson*, Coop. Eq. 259; *Jackson v. Corliss*, 7 John. (N. Y.) 537.

⁵ *Bemis v. Wilder*, 100 Mass. 446.

⁶ *Bailey v. De Crespigny*, 10 B. & S. 1.

⁷ *Schroeder v. King*, 88 Conn. 78.

⁸ Comyn's Dig. tit. Condition (Q).

⁹ *Yarnold v. Moorehouse*, 1 R. & M. 364.

¹⁰ *Lockwood v. Clark*, 8 East, 184.

as he pleases, and if he expressly provides therein that the lease shall cease if taken upon execution or otherwise by operation of law, the provision is valid and operative.¹ A condition that the lessee shall not assign, sublet, or otherwise part with the lease, is not broken until an actual transfer is made; consequently, a valid agreement to sell does not operate as a breach.² Where a license is required as a condition precedent to a sale or transfer of the lease, it is the duty of the lessee to procure such consent³ if the assignee requires him to do so; but, as the privilege is personal, the assignee or subtenant may waive it.

SEC. 322. Assignments generally.—Nature of.—An assignment is the transfer or conveyance of some pre-existing term or reversion, estate, right, title or interest. The party assigning is called the assignor, and he to whom the assignment is made, the assignee. The word "assigns" extends not only to the immediate assignee, but also to assignees *ad infinitum*.⁴ Every one who has

¹ Duke of Norfolk v. Hawke, 2 East, 481.

² Mayhew v. Hardesty, 8 Md. 479.

³ Roberts v. Geis, 2 Daly (N. Y. C. P.) 535; Lloyd v. Crispe, 5 Taunt. 549; Austin v. Harris, 10 Gray (Mass.) 296; Mason v. Cor-der, 7 Taunt. 9.

⁴ Milkman v. Ordway, 106 Mass. 232; Blake v. Sanderson, 1 Gray (Mass.).

⁵ Com. Dig. Tit. Assignment (A. B.) In Dunlap v. Bullard, Mass. S. C. 1868, Ostrom held as lessee from the plaintiff, a lease of premises which expired in twenty-two years from 1855, at a fixed rent payable quarterly. It contained a covenant to pay taxes. In 1868 Ostrom leased the premises with buildings erected since the date of the original lease, to one Johnson, for a term equal to the whole of the unexpired term of the original lease, but at an increased rent payable monthly. The last named lease also contained covenants on the part of the lessee to pay rent and taxes, and that the lessor might enter and take possession for breach of covenant, and that the lessee would quit and deliver up

the premises to the lessor at the end of the term. This lease was assigned by Johnson to the defendant. Thereafter taxes were assessed which were not paid by defendant. In an action by the plaintiff against defendant for such taxes, held, that defendant was a sub-lessee of Ostrom and not an assignee of the original lease, and was not liable to plaintiffs on the covenant therein to pay taxes. Said CALT J., "to constitute an assignment of a leasehold interest, the assignee must take precisely the same estate in the whole, or in a part of the leased premises, which his assignor had therein. He must not only take for the whole of the unexpired term, but he must take the whole estate, or in other words, the whole term. 2 Bl. Com. 144. The grant of an interest therefore which may possibly endure to the end of the term is not necessarily a grant of all the estate in the term. If by the terms of the conveyance, be it in the form of a lease or an assignment, new conditions with a right of entry, new causes of forfeiture, are created, then the tenant holds by different tenure, and a new

a term, estate or interest in lands or tenements, or in things which lie in grant, may dispose of his estate therein by assignment, unless expressly restrained from so doing by some condition in his lease, and except tenants at will and tenants on sufferance.¹ But a right of re-entry for a forfeiture cannot be so assigned.² Generally speaking, a mere chose in action is not assignable at law, so as to enable the assignee to sue thereon in his own name.³ But covenants which run with the land form exceptions to this rule. They may be assigned together with the land, and the assignee may sue thereon in his own name for breaches subsequent to the assignment, but not for previous breaches.⁴ If a lessee enters into a covenant which runs with the land, for himself and his assigns, and then assigns the term, and the assignee is guilty of a breach, an action of covenant lies either against the lessee or against the assignee, at the election of the lessor, who may charge both, but execution must be taken against one of them only.⁵ A power, where it is coupled with an interest, may be assigned, although a bare power is not assignable; therefore, if a lease is made with an exception of the trees, and a power is reserved to the lessor to enter and cut them down, he may assign his power to another person; but if it is not properly pursued, the lessee may maintain trespass both against the lessor and his assignee.⁶ A license to search

leasehold interest arises which cannot be treated as an assignment, or a continuation to him of the original term. When an estate is conveyed to be held by the grantee upon a condition subsequent, there is left in the grantor a contingent reversionary interest. See *Austin v. Cambridgeport Parish*, 21 Pick. (Mass.) 215; *Brattle Square Church v. Grant*, 3 Gray, (Mass.) 142. If the smallest reversionary interest is retained, the tenant takes as sub-lessee and not as assignee. *Patten v. Deshon*, 1 Gray 325, and *McNeil v. Kendall*, 128 Mass. 245."

¹ *Perrin v. Lepper*, 84 Mich. 292; *Greenway v. Adams*, 12 Ves. 395; *Cooney v. Hayes*, 40 Vt. 478; *Robinson v. Perry*, 21 Ga. 183. A ten-

ant at will has no assignable interest. *Whittemore v. Gibbs*, 24 N. H. 484.

² *Trask v. Wheeler*, 7 Allen (Mass.) 109.

³ *Fairlie v. Denton*, 8 B. & C. 395; *Jones v. Carter*, 8 Q. B. 134; *Thompson v. Dominy*, 14 M. & W. 403; *Howard v. Shephard*, 9 C. B. 297; *Wetherell v. Langston*, 1 Exch. 634, 645; *Sepping v. Nokes*, 2 C. B. 292; *Ord v. White*, 3 Beav. 357.

⁴ *Martyn v. Williams*, 1 H. & N. 817; *Southwark v. Smith*, 3 Burr. 1272; *Grescott v. Green*, 1 Salk. 199; *Brittin v. Vaux*, Lutw. 109; *Hawkins v. Sherman*, 3 C. & P. 459.

⁵ 1 Chit. Arch. 544.

⁶ *Warren v. Arthur*, 2 Mod. 817.

for and raise metals, and also to carry them away and convert them to the use of the licensee, passes an interest which is capable of being assigned.' An agreement for a lease may be sold and assigned: but the landlord cannot be compelled to grant such lease direct to the assignee. Upon the contract for such sale, it is not an implied condition that the party who agreed to grant the lease had power to do so.' An agreement for the assignment of *all B's interest* in a lease does not mean free from all underleases by way of mortgage and other incumbrances then affecting the premises.' The good will of a lease, or the reasonable expectation of its renewal, is assignable, and may be transferred by deed as well as by assignment endorsed upon the lease.' But a contract to pay a certain sum for rent, *and to make certain improvements*, has been held not to be assignable so as to vest in the assignee a right to maintain an action in his own name for the breach; but a lessor may assign the lease so as to enable the assignee to recover the reserved rent, without a sale of the reversion.' A sale of the reversion carries with it, unless expressly reserved, all rents and rights under a lease previously granted that subsequently become due, and the grantee may recover them in an action in his own name.' Upon such conveyance, the grantee takes the place and assumes the rights and liabilities of the original landlord. In other words, he becomes landlord as fully as though the lease had been made by himself, whether he knew all the terms of the lease or not, and the same rule prevails when a *part* only of the

¹ *Muskett v. Hill*, 5 Bing. N. C. 694; *Hanley v. Wood*, 2 B. & Ald. 724; *Ex parte Hankey*, 1 M. & M. 247.

² *Kintrea v. Preston*, 1 H. & N. 357.

³ *Phelps v. Prothero*, 16 C. B. 370.

⁴ *Bennett v. Vansyckle*, 4 Duer (N. Y. Superior Ct.) 462. An option to take a lease is assignable. *Buckland v. Papillon*, L. R., 2 C. R. 67.

⁵ *Esty v. Baker*, 48 Me. 495.

⁶ *Hicks v. Doty*, 4 Bush. (Ky.) 420.

⁷ *Watson v. Hunkins*, 13 Iowa, 547. In Ohio, the Stat. 32 Hen. 8,

c. 34, is not in force, and the grantee of the premises cannot sue upon the covenants in his own name unless they are specially assigned. *Masury v. Southworth*, 8 Ohio St. 340.

⁸ *Gale v. Edwards*, 52 Me. 363; *Dixon v. Nichols*, 39 Ill. 373; *Hatfield v. Lockwood*, 18 Iowa, 296; *Lewis v. Wilkins*, Phill. (N. C.) Eq. 302; *Johnston v. Smith*, 3 Penn. St. 496; *York v. Jones*, 2 N. H. 454; *Kornegay v. Collier*, 65 N. C. 69; *Rogers v. McKenzie*, 65 id. 218.

⁹ *Page v. Esty*, 54 Me. 319

demised premises are conveyed; the grantee in such a case is entitled to an apportionment of the rents, and this, whether he takes by deed or under execution or other legal process.¹ But, payment of the rent to the grantor will be good until the lessee has notice of the conveyance,² as the tenant is not bound to examine the records or make any inquiry as to a change of title. If the grantee desires to protect himself against payments of the rent to the lessor, he must notify the tenant of the transfer to him.³ The grantee is bound by all the covenants that run with the land; hence, a grantee is bound by a covenant on the lessor's part to pay for improvements made upon the land by the tenant;⁴ but where a lessor covenants to erect a building upon the demised premises, the covenant not relating to a thing *in esse* does not run with the land, and, unless assigns are expressly mentioned, an assignee takes no benefit from the covenant.⁵

Persons become assignees either by act of the party or by act of law; under the first head may be classed those who become so by an instrument of assignment, or by act of attornment: under the latter head may be stated, those who have thrown upon them the interest in the premises—in consequence of the property having been taken under writs of execution—by bankruptcy—by marriage—or by death.

A receiver *pendenti lite* appointed in an equity suit is clothed with no estate in the property intrusted to him and is a mere custodian of it for the court, and there-

¹ Montague v. Gay, 17 Mass. 439; Newall v. Wright, 3 id. 158; Keay v. Goodwin, 16 id. 1; Crosby v. Loop, 13 Ill. 625; Farley v. Craig, 11 N. J. L. 262. Where several persons hold the entire interest of the lessee by separate deeds of assignment they are not jointly liable for the rent; but each is liable only according to his interest in the premises as compared with the whole interest under the lease. Babcock v. Scoville, 56 Ill. 461; Van Rensselaer v. Gallup, 5 Den. (N. Y.) 454; Van Rensselaer, 8 id.

185. If there is no proof of value, the apportionment will be made according to the quantities. Van Rensselaer v. Jones, 2 Barb. (N. Y.) 643.

² Farley v. Thompson, 15 Mass. 18; Fitchburgh Corporation v. Melvin, id. 268.

³ Id.

⁴ Frederick v. Callaghan, 40 Iowa, 811; Bailie v. Radway, 27 Wis. 172.

⁵ Cronin v. Watkins, 1 Tenn. Ch. 119.

fore, by taking possession of a leasehold estate he does not become an assignee of the term.¹

SEC. 323. *Assignments of the reversion.—How made.*—32 Hen. 8, c. 34.—A lessor may by deed assign his reversion. At common law such an assignment would only have given the assignee a right to the rent reserved, to distrain for it, and to sue for breaches of covenants in law, but not for breaches of express covenants entered into by the lessee with the lessor;² to remedy this, the statute 32 Hen. 8, c. 34, enacted that all grantees of reversions should enjoy all the advantages, benefits and remedies by entry for non-payment of the rent, or for doing of waste or other forfeiture,³ or by action only, for non-performance of conditions, covenants or agreements, contained or expressed in leases, which the grantors or lessors themselves had or enjoyed. So that now the grantee of a reversion may take advantage of all express covenants *which run with the land*, as well as of covenants in law, though only the lessor and his heirs are named in the lease.⁴ Causes of action which accrued previous to the assignment of the reversion will not pass with it, so as to enable the assignee to sue for them in his own name.⁵ The remedy is mutual, for the same statute gives the lessee a right of action against the grantee of the reversion.⁶

¹ Gaither v. Stackbridge, (Md.) 8 Centl. Rep. 789, BRYAN dissented, but the reasons advanced by ALNEY, C. J., seem to fully sustain the rule adopted by the court.

² 1 Wms. Saund. 240 a, note (2); 1 Smith L. C. 42 (4th ed.); Martyn v. Williams, 1 H. & N. 817, 826.

³ Bennett v. Herring, 3 C. B. N. S. 370.

⁴ Thursby v. Plant, 1 Saund. 287; 1 Smith L. C. 43. This statute is not in force in Ohio and a grantee cannot sue upon the covenants in his own name unless they are specially assigned. Masury v. Southworth, ante.

⁵ Hunt v. Bishop, 8 Exch. 675; Hunt v. Remnant, 9 Exch. 635; Martyn v. Williams, 1 H. & N. 817.

⁶ Sect. 2; Jourdain v. Wilson, 4 B. & Ald. 266. A trustee rented trust property, and took a note for the rent, which he sold before maturity; the lessee sublet, and took

a note for the rent, which was paid. One holding a judgment against the income of a trust estate levied on cotton raised by the sub-tenant. It was held, that the rent-note was the income, and the cotton was not subject. Manget v. Hightower, 63 Ga. 217. Under La. Code, art. 466, the rents of seized property belong to the seizing creditor from the moment of seizure, and he has an action against the tenant to recover them, which is not suspended during the delay resulting from either the usual proceedings to effect the sale, or a contest over the proceeds after the sale is made. Lamorere v. Cox, 32 La. An. 1045. A party purchasing leased land at a partition sale is entitled to the unpaid rents which have thereafter accrued. Stevenson v. Hancock, 73 Mo. 612.

The statute does not extend to mere collateral covenants;¹ but it includes devisees, grantees of part of the reversion,² and, for some purposes, assignees of the reversion of part of the demised premises.³

SEC. 324. *How assignments of the reversion may be made.*—An assignment of the reversion must be by deed, unless otherwise provided by statute. Indeed, all conveyances of real estate, or an interest therein, must be in conformity with the statute in the State where the estate is located, and it would be useless to attempt to give any general rule relative thereto, as the statutes in the several States vary as to the necessary requirements.⁴ A let a house to B, as tenant from year to year, and afterwards granted a lease by deed to C of the house for twenty-one years: this was held to transfer the reversion to C, and to disentitle A to recover from B the rent due after the lease.⁵ A conveyance in fee, whether absolutely or by

¹ Webb v. Russell, 8 T. R. 393. A lease of certain premises contained the covenant by the lessee, that he or others having his estate in the premises would not assign the lease without the written consent of the lessor. During the term the lessee with such consent assigned one undivided half of his interest in the lease to a third person, who subsequently during the term re-assigned the same to the lessee without the consent of the lessor. It was held that the re-assignment was not a breach of the covenant in the lease. McCormick v. Stowell, 138 Mass. 431.

² Machell v. Dunton, 2 Leon. 33.
³ Attoe v. Hemmings, 7 Bulst. 281; Wright v. Burroughs, 8 C. B. 685; Co. Lit. 215 a; Rawlings v. Morgan, 34 L. J. C. P. 185.

⁴ Twynam v. Pickard, 2 B. & Ald. 105; Simpson v. Clayton, 4 Bing. N. C. 758; Badeley v. Vigurs, 4 E. & B. 71; 1 Smith L. C. 44.

⁵ Beely v. Perry, 8 Lev. 155; Brawley v. Wade, MClel. 664. In New York the statute of 1875, ch. 542, reverses the common-law rule, and makes the right to rent follow the ownership of the property during the period within which it was

earned. People v. Globe Mut. Life Ins. Co., 65 How. (N. Y.) Pr. 81. In Alabama, by statute, when the lessor dies rents afterwards accruing may be recovered by the personal representative. Palmer v. Steiner, 68 Ala. 400. In Redmon v. Bedford, 80 Ky. 13, a tenant for life permitted A to sow a field with wheat, each furnishing half the seed and to take half the crop. It was held that the relation of landlord and tenant existed, and that, the life tenant having died during the year, his half of the crop, after deducting the value of the wheat furnished by him, should be apportioned between his representatives and the remainder-man, as rent is apportioned in such cases. In Epley v. Eubanks, 11 Ill. App. 272, land having been sold under a foreclosure decree, the mortgagor leased it to a third person until March 1, 1880, rent payable in corn, to become due when the tenant should sell his corn. The right of redemption from the foreclosure sale expired November, 1879, when the purchaser received a deed and notified the tenant to pay him the rent. In December, 1879, the purchaser conveyed to plaintiff, who

way of mortgage, will pass a term which has been carved out of it, and afterwards re-assigned to the grantor, subject to an underlease.¹

SEC. 325. Effect of a mortgage of the reversion.—Mortgages *subsequent* to a lease operate as grants of the reversion, and carry with them, as incidental to such reversion, a right to the rent and the benefit of the landlord's remedies for the recovery.² The mortgagee, therefore, may enforce the payment of the rent from the lessee either by distress or action; and the lessee will be exonerated by such payment from any demand on the part of the mortgagor or those claiming under him; even though actual compulsion on the part of the mortgagee has not been resorted to, but the lessee has paid the rent voluntarily.³ Payments agreed to be made by an occupier of the soil, under a parol license to dig earth and make bricks, are in the nature of rent; and as such, a subsequent mortgagee is entitled, after notice in the usual manner, to all sums in arrear at the time of the notice, or which may become due afterwards.⁴ A mortgagee of a term who has never taken possession is not an assignee of the whole term, or liable for rent in arrear, as the mortgage is not an absolute conveyance of the term, but a conditional one, the title remaining in the mortgagor.⁵

SEC. 326. What amounts to an assignment.—An assignment must be *by deed*, and must pass the legal estate of the assignor; for a transfer of a mere equitable interest

demand the rent corn from the tenant. The corn had matured before the date of the deed given to the foreclosure purchaser, was gathered before the conveyance to the plaintiff but was not sold until January, 1880. It was held that plaintiff, and not the original owner of the land, was entitled to the rent corn.

¹ *Harmer v. Bean*, 8 C. & K. 807; *Burrows v. Gradin*, 1 D. & L. 218; but see *Edwards v. Wickwar*, L. R., 1 Eq. 413.

² The assignment of a lease as collateral security for a loan, does not entitle the assignee to the pos-

session of the demised premises, except upon a breach of the agreement; and he is not liable to the reversioner on the ground of privity of contract, but by privity of estate, or the actual occupation and beneficial enjoyment. *Engels v. McKinley*, 5 Cal. 158; *Burton v. Barclay*, 7 Bing. 745.

³ *Moss v. Galimore*, 1 Doug. 279; 1 Smith L. C. 470 (4th ed.).

⁴ *Ex parte Hankey*, 1 M. & M. 247.

⁵ *Tallman v. Bressler*, 65 Barb. (N. Y.) 369; *Astor v. Hoyt*, 5 Wend. (N. Y.) 603.

will not make a man liable as an assignee. An agreement to take an assignment of a lease, followed by possession on the part of the equitable assignee, is not sufficient to give the lessor any right to sue the equitable assignee in equity on the covenants in the lease.¹ The delivery and depositing of a lease as a security for money, without any written assignment, passes no interest at law, although it may create a right which may be enforced in equity;² but the transfer may be complete, although the assignee has never in fact got possession of the deed of assignment, by reason of a claim of lien on the part of the assignor's attorney for the expense of preparing it.³ The covenant will not be extended by construction; thus, a covenant not to assign for the benefit of creditors, will not be broken by an assignment *not* for the benefit of creditors;⁴ nor will a covenant not to assign to a certain person named be broken by an assignment to a third person, who subsequently assigns to the person against whom the covenant provides,⁵ unless made with the intention that such third person should assign over to him.⁶

SEC. 327. *Distinction between an assignment and an underlease.*—An assignment, as contra-distinguished from an underlease, signifies a parting with the *whole term*; and when the whole term is made over by the lessee, although in the deed by which that is done the rent and a power of re-entry for non-payment are reserved to himself, and not to the original lessor, yet the instrument amounts to an assignment, and not an underlease;⁷ and in such a

¹ Cox v. Bishop, 8 DeG. M. & G. 815.

² Doe d. Maslin v. Roe, 5 Esp. 105; Williams v. Evans, 23 Beav. 239.

³ Odell v. Wake, 3 Camp. 394.

⁴ Phila., &c., R. R. Co. v. Catawissa, &c., R. R. Co., 53 Penn. St. 20.

⁵ In — v. —, Dyer 45 a, a question was raised whether a condition in a lease to A upon condition that he should not assign to J S, was broken by his assignment to B B, who subsequently assigned

to J S, and the court held that it was not because the condition must be taken strictly.

⁶ Co. Litt. 223 b.

⁷ In Collamer v. Kelly, 12 Iowa, 319, it was held that an instrument under which a lessee transfers the estate reserved to him, but at an *increased rent, and with a covenant for a redelivery of possession to him*, was a sublease, and not an assignment. In that case, W holding at a rent of \$150 per annum, sublet for his whole term at \$250 per annum, possession to be deliv-

case, the person to whom it is made over may sue the original lessor or his assignees of the reversion, or be sued by them as assignee of the term, on the respective covenants in the original lease, which run with the land, even though new covenants are introduced into the assignment.¹ It is necessary that the person sought to be charged as an assignee should claim and be in possession through the same estate as the person whom he succeeds; for if he comes in by an elder title, he is not an assignee.² Nor is a person who enters into possession under a decree without a sale, where the law requires a sale, although he enters by the permission of the lessee, an assignee of the lease, so as to render him liable upon its covenant.³ If a lessee for years make a lease for a time exceeding his interest, it operates as an assignment: therefore, if a lessee for three years assigns his term for four years, or demises the premises for four years, it operates as an assignment of his interest.⁴ A conveyance by a lessee of the remainder of his unexpired term, though it employs words ordinarily used in a demise, and contains a reservation of rent, and the right of re-entry on covenants broken, is not an underletting or sublease, but is consid-

ered to him at the last day of the term. This sublease was assigned to Y, who mortgaged his "leasehold interest" under the lease and assignment. Afterward, W assigned his lease and it came through *mesne* assignments to Y, from whom it was further assigned to the defendant. In a suit to foreclose the mortgage to which the defendant was made a party, it being claimed that his estate was merged for the benefit of the mortgagee by the union of the two estates in Y, it was held, that there was no such merger; that the original lease could not be merged in the smaller estate; that the rights of the mortgagee passed by the transfer of the original lease to Y; but that the effect of this assignment was to reduce the rent to the rate of \$150 fixed by the original lease. See also *Post v. Kearney*, 2 N. Y. 394; *Martin v. O'Connor*, 48 Barb. (N. Y.) 514. A sublease vests only a *part* of the

term in the lessee, but an assignment carries the whole. *Constantine v. Wake*, 1 Sweeney (N. Y. Superior Ct.) 239. See also *Martin v. O'Connor*, 48 Barb. (N. Y.) 514, where it was held that where a lease of the lessee's whole term was made, but a right of re-entry was reserved, the conveyance amounted only to a sublease. *Hicks v. Downing*, 1 Ld. Raym. 99; *Palmer v. Edwards*, 1 Doug. 187; *Thorne v. Woolcombe*, 3 B. & Ad. 595; *Preece v. Corrie*, 5 Bing. 24; *Parmenter v. Webber*, 8 Taunt. 593; *Wollaston v. Hake-will*, 3 M. & G. 297; *Pascoe v. Pascoe*, 3 Bing. N. C. 898; *Langford v. Selmes*, 3 Kay & J. 220; 2 Prest. Conv. 124; *Cole Ejec.* 223.

¹ *Palmer v. Edwards*, 1 Doug. 187, *n.*

² *Roach v. Wadham*, 6 East, 289.

³ *Merchants' Ins. Co. v. Muzange*, 22 Ala. 168.

⁴ *Hicks v. Downing*, 1 Ld. Raym. 99; *Bull. N. P.* 106.

ered in law as an assignment of his whole interest, as there remains in him no reversion of the estate; it being one of the essentials of a lease that it should contain a reversion in favor of the grantor. The reconveyance of the leasehold estate by *mesne* conveyances of such description to the grantor, passes the entire estate of the lessee, which thereby becomes merged in the fee and extinguished.¹ Where a lessee in a lease containing the usual

¹ *Smiley v. Van Winkle*, 6 Cal. 605. It is essential to an underlease that it be of a part only of the unexpired term. When the transfer is of the whole term, the person taking is an assignee, and not a subtenant, even if the form be that of an underletting. In the absence of any evidence of the agreement under which parties entered into possession of demised premises, subsequent to the lessees, if it is shown that they occupied during the whole of the unexpired term of the lease, the fair presumption is that they entered for the whole of such unexpired term. And as such an interest is given, not by an underlease, but by an assignment, the presumption must be that the occupants are in as assignees, and not as undertenants. *Bedford v. Terhune*, 80 N. Y. 458. But this presumption may, in either case, be rebutted by proof that there never was in fact such an assignment. In an action for rent on a lease of a store-room, it appeared that the lease was for five years from May 1, 1857; that by its conditions the lessee could not, without forfeiture, assign or underlet except upon the written consent of the lessor, which was never given; that the defendant bought the lessee's stock of goods, and occupied the premises from December, 1857, and paid the lessor the rent named in the lease for two quarters; that he then agreed with the lessor for the use of the premises for one year at a reduced rate; that at the expiration of that year the lessor demanded the rent named in the lease for the rest of the term; that the parties disagreed, and the defendant, after occupying the premises six months longer, left them. The defendant introduced evidence tending to

show that there was no assignment in fact. Held, that it was error for the court to instruct the jury, that the agreement as to rent for one year at a rate less than that called for by the deed, "did not amount to a new lease, but was merely an agreement to reduce the rent for one year upon the existing lease; that upon the statement of all the parties it had only the effect to temporarily diminish the rent; and that, after that year, all the provisions of the lease would be in force." The question whether the defendant, at the time of such agreement, was in under the lease, should have been submitted to the jury upon the inference raised by the law in favor of an assignment, and upon the opposing evidence, and not upon that inference alone as though it were conclusive. Upon the facts put in evidence by the defendant, he became an undertenant at will of the lessee; but as to the lessor, before the reletting at a diminished rent, he might, by virtue of the covenant against underleasing, with the condition for a forfeiture, have been regarded as a *quasi* tenant by sufferance. *Cross v. Upson*, 17 Wis. 618; *Marinor v. Crocker*, 18 id. 251. Where by the terms of a lease it is made a ground of forfeiture of the term if the lessees shall let or underlet without the written consent of the lessor, and parties other than the lessees are in possession without such consent, in the absence of any proof as to the agreement under which they entered, the presumption (if any presumption is to be indulged in) is that the transfer to the occupants was by assignment, and not by underletting. Where the defendants entered by consent of the lessees,

covenants, assigns by deed his interest in the whole of the unexpired term to another, the latter stands in the relation of assignee, not of sublessee, to the landlord, and is liable to him on the covenants contained in the lease. And it is so if a part of the premises is excepted in the deed of the last assignor.¹ In an action by the lessor against a person as assignee of the term, to whom the lessee demised for a longer term than he himself had, and at a higher rent; it was held to operate in law as an assignment and that it might be so described in pleading.² Where the lessee of two farms had agreed in writing with another that the latter should have them during the lease, remaining tenant to the lessee during that period; the undertenant accordingly took possession and paid a year's rent to the lessee, who afterwards distrained for rent in arrear: it was held that the agreement amounted to an absolute assignment of all the lessee's interests, and that he (having no reversion) was not enabled to distrain.³ But it by no means follows that an action for use and occupation, or of debt for rent, or of covenant, could not have been maintained. A parting with the whole term by verbal agreement has been held to create the relation of landlord and tenant, as between the parties, although there was no reversion.⁴ So a lessee who had underleased by indenture for a term of years longer than his own, the underlessee covenanting to pay him rent, has been held entitled to sue the underlessee for such rent.⁵ Where a

had the lease in their hands, and paid the rent thereon, to the lessor, for the benefit of the lessees, and occupied for the whole residue of the term, and there was no evidence of a holding in any other character, it was held, that under these circumstances the law would presume they were in as assignees of the lease; and that they were liable as such on the lease, for the rent. But when the law infers an assignment of a lease from certain facts proved, the inference must be of a *valid, operative assignment, such a one as would be sufficient to transfer the term, and it is incumbent upon persons sought to be charged with the rent, as assignees,*

to prove either that there was no assignment, or that it was one void in law. Bedford v. Terhune, ante.

¹ Lee v. Page, 4 Mich. 106.

² Wollaston v. Hakewill, 3 M. & G. 297.

³ Parmenter v. Webber, 8 Taunt. 593; — v. Cooper, 2 Wils. 375; Preece v. Corrie, 5 Bing. 24; Pascoe v. Pascoe, 3 Bing. N. C. 898; Langford v. Selmes, 3 K. & J. 220.

⁴ Preece v. Corrie and Pascoe v. Pascoe, ante.

⁵ Baker v. Gostling, 1 Bing. N. C. 19; Williams v. Haywood, 1 E. & E. 1040; In Re Turner, 11 Ir. Ch. Rep. 304; Adams v. Beach, 1 Phila. (Penn.) 99.

lessee demised to another for the whole of his term at a weekly rent, it being the intention of the parties to create the relation of landlord and tenant: it was held, that such demise was not to be deemed an assignment against the intention of the parties; and that an action for use and occupation might be brought by the lessee in respect of the whole term, although the lessee had given a week's notice to quit before the expiration of the term, and had quitted accordingly.' A tenant from year to year who underlets for a long term, does not thereby assign all his estate which may possibly continue longer than the term expressed to be granted by the underlease.' An assignment of a *part* of the premises amounts only to an underlease, and the lessor can sustain no action against the assignee, either for rent or upon the covenants in the lease.' There is this important distinction to be observed between the effect of an assignment and an underlease. An assignee is directly liable to the lessor upon all the covenants in the lease, that run with the land, while a subtenant is liable only to his immediate landlord—the original lessee—or his assignee, and then, only upon such covenants as the underlease contains.' An undertenant cannot be charged by the original landlord, for use and occupation even.'

SEC. 328. *Operative words in assignments.*—An assignment is usually made by the word "assign," but sometimes "grant, assign, and set over," are used; no particular words are necessary, provided the intention of the parties is sufficiently expressed. Where a lessee for life granted all his estate and interest to A and his executors: it was held not to amount to an assignment, because a grant to a man and his executors could not convey an

¹ Pollock v. Stacy, 9 Q. B. 1088.

² Oxley v. James, 18 M. & W. 209.

³ Fulton v. Stewart, 2 Ohio, 215.

⁴ Way v. Hallon, 46 Vt. 184;

Quackenboos v. Clarke, 12 Wend.

(N. Y.) 555; Babcock v. Scoville,

56 Ill. 461; Halford v. Hatch,

Doug. 188; Kain v. Hoxie, 2 Hilt.

(N. Y. C. P.) 811; Jackson v. Da-

vis, 5 Cow. (N. Y.) 129; McFarlan

v. Watson, 8 N. Y. 286; Harvey v.

McGraw, 44 Tex. 412; but the land-

lord may eject him if he violates

any of the covenants in the lease

for which a right of re-entry is

reserved. Samson v. Rose, 65 N.

Y. 411.

⁵ Way v. Holton, ante; Jen-

nings v. Alexander, 1 Hilt. (N. Y.

C. P.) 154.

estate for life, being a freehold.' Words excepted out of the lease, but subsequently granted by the lessor to the lessee, will not pass by an assignment of the lease.² An agreement to assign on payment of a sum by instalments, the assignee in the mean time to perform the covenants in the lease and keep the assignor harmless, and the assignor to re-enter on non-payment of any instalment, is merely an agreement for and not an assignment.³ Where a lessee agreed to execute an effectual assignment of two leases of premises, "as he held the same for terms of twenty-eight years," and the assignee agreed to accept a proper assignment of the leases as above described, without requiring any guaranty as to the lessor's title, it was held that he was bound to take an assignment of two consecutive leases, though the second was void, because executed under a power which had not been pursued.⁴

SEC. 329. Usual covenants in assignments.—The proper and usual covenants on the part of the assignor of a term of years are, that notwithstanding any act or thing by him made, done, executed or knowingly suffered, the lease is valid, and in full force: that all the rents, covenants and conditions have been paid, performed and observed to that time: that notwithstanding any such act or thing as aforesaid he has power to assign: and for quiet enjoyment by the assignee during the remainder of the term, without interruption by the assignor or any person claiming under him: free from incumbrances by him: and for further assurance. The proper covenants on the part of the assignee are, that he will pay the rent and perform the covenants in the lease, and save harmless the assignor from any breach thereof by him or his assigns.⁵ On an agreement to assign a lease, and to indemnify the lessee from the rent, the assignee entered

¹ *Earl of Derby v. Taylor*, 1 East, 502.

² *Godb.* 188.

³ *Hartshorne v. Watson*, 5 Bing. N. C. 477.

⁴ *Spratt v. Jeffery*, 10 B. & C. 249; *Tweed v. Mills*, L. R., 1 C. P. 39.

⁵ *Staines v. Morris*, 1 V. & B. 10; *Wolveridge v. Steward*, 1 Cr. & M. 644; *Harris v. Goodwyn*, 8 Dowl. 409; *Burnett v. Lynch*, 5 B. & C. 589.

before any legal assignment was made, some goods of the lessee being left on the premises ; it was held that the assignee was liable on his idemnity, those goods having been taken as a distress for rent, and that it was immaterial whether the goods left were with the leave of the assignee or not.¹

SEC. 330. **General liability of lessee and assignee.**—A lessee continues liable upon express covenants in the lease, notwithstanding any assignment ; therefore an action of *covenant* will lie against a lessee for years, on an express covenant, notwithstanding he has assigned his term, and the lessor has accepted rent from the assignee ;² but an action of *debt* will not lie after assignment and acceptance of rent.³ The executor of a lessee is liable to the lessor and his assigns on such covenants, though the lessee may have assigned his term, and the lessor or his assigns accepted rent of the assignee of the term ;⁴ but as the assignee of the term is a stranger to the original contract between the lessor and lessee, there can only exist a privity of estate between himself and the lessor or the assignee of the reversion ; and he is bound only to the performance of the covenants during the time such privity exists, and then only to such covenants as run with the land.⁵ The lessor may at the same time sue the lessee upon his express covenant, and the assignee upon the privity of estate ; but he can have execution against one only.⁶ An eviction out of part of the land will only amount to a discharge of an assignee *pro tanto*.⁷

SEC. 331. **On what covenants the assignee is liable.**—An assignee must take the thing assigned subject to all the equity to which the lessee was subject ; and is bound to

¹ Groom v. Bluck, 2 M. & G. 567.

² Port v. Jackson, 17 John. (N. Y.) 239, 479 ; Damb v. Hoffman, 8 E. D. S. (N. Y. C. P.) 361 ; Barnard v. Godscall, Cro. Jac. 309 ; Thursby v. Plant, 1 Wms. Saund. 240 ; 1 Smith L. C. 47.

³ Esp. N. P. 201.

⁴ Batchelor v. Gage, Cro. Car. 188 ; Barnard v. Godscall, Cro.

Jac. 309 ; Norton v. Acland, Cro. Car. 579 ; Glover v. Cape, 4 Mod. 81 ; Marsh v. Bruce, Cro. Jac. 384 ; Bret v. Cumberland, Cro. Jac. 522 ; 1 Smith, L. C. 47.

⁵ See Sec. on Covenants that Run with the Land.

⁶ 1 Chitty, Arch. 544.

⁷ Stevenson v. Lombard, 2 East, 575 ; Campbell v. Lewis, 3 B. & Ald. 392.

perform all the covenants which are annexed to the estate, for by the acceptance of the possession of the land, he makes himself subject to all the covenants which run with the land, as well as to covenants in law, which are inherent in the estate; and to such he is bound without being named by the special word "assigns."¹ Thus, on a covenant by a lessee, not naming assigns, to repair and yield up in repair all buildings and erections erected and to be erected during the term on the demised premises, an assignee is liable in respect of the non-repair of buildings erected during the term;² but the assignee of a lease is not liable to the original lessor for a breach of covenant not running with the land.³ He is, however, liable to his immediate assignor upon any express covenants by him in the deed of assignment.⁴ The assignee of a term is not liable to the lessor or his assigns on mere collateral covenants, therefore, where the lessee of certain premises covenanted to pay annually, during the term of twenty-one years, twenty shillings to the church-wardens of the parish, his assignee was held to be not liable.⁵ Where a lessee of tithes covenanted for himself and his assigns not to take tithe in kind from the other party (the owner of lands in the parish), nor from his tenants, but to accept a reasonable composition, not exceeding three shillings

¹ *Graves v. Porter*, 11 Barb. (N. Y.) 592; *Bull. N. P.* 159; *Parker v. Webb*, 8 Salk. 4. Whether he takes as mortgagee or direct purchaser from a tenant, or buys the right at sheriff's sale. *Wilson v. Watkins*, 8 Pet. (U. S.) 60; *McMurphy v. Minat*, 4 N. H. 251. But holding that a mortgagee in possession is not liable as assignee upon the covenants in the lease, see *Johnson v. Sherman*, 15 Cal. 287, and he is bound to know the provisions of the lease, and the fact that he did not know them, or that he has been deceived by the lessee in reference thereto, is no defence. *Barraelhet v. Battelle*, 7 Cal. 450; *Lee v. Payne*, 4 Mich. 106. But in order to make a person liable as assignee, the lessee's whole term must be conveyed. If he reserves a reversion even for one day or even a shorter period,

the conveyance is a sublease, and the lessee alone is liable to the lessor. *Davis v. Morris*, 36 N. Y. 569. An assignee by accepting the assignment of the lease takes it subject to all the liabilities of the lessee. *Cox v. Fenwick*, 4 Bibb. (Ky.) 538; *Graves v. Porter*, 11 Barb. (N. Y.) 592; *Overman v. Sanborn*, 27 Vt. 54; *Blake v. Sanderson*, 1 Gray (Mass.) 332; *McCormick v. Young*, 2 Dana (Ky.) 294; *Journey v. Brackley*, 1 Hilt. (N. Y.) 447.

² *Minshull v. Oakes*, 2 H. & N. 793.

³ *Grey v. Cuthbertson*, 4 Doug. 351; 1 Selw. N. P. 534.

⁴ *Harris v. Goodwyn*, 9 Dowl. 409; *Burnett v. Lynch*, 5 B. & C. 539; *Wolveridge v. Steward*, 1 Cr. & M. 644.

⁵ *Mayo v. Buckhurst*, Cro. Jac. 438; *Bateman v. Allen*, Cro. Eliz. 437.

and sixpence per acre, his underlessee of the tithes was held not to be an assignee within the meaning of the covenant, and not bound by such a covenant of the lessee.¹ Though generally a personal or collateral covenant does not affect an assignee, yet if the covenant regards something to be done upon the land, and the assignee is named, though it was not in being at the time of the demise, and is in some measure collateral—as to build a wall or new house upon the land—it binds the assignee.²

SEC. 332. *Rights and liabilities of assignee.*—A mere deposit of a lease by way of equitable mortgage does not render the person with whom it is deposited liable at law,³ or, perhaps, in equity,⁴ for the rent or upon the covenants. An agreement to take an assignment of a lease, followed by possession on the part of the equitable assignee, does not entitle the lessor to sue him on the covenant in the lease.⁵ A person who has accepted a valid assignment from the lessee, although he has not taken possession of the premises,⁶ becomes liable for rent subsequently accruing, and for breaches committed subsequently to the assignment, of such of the lessee's covenants as run with the land.⁷ On the other hand, he is entitled to sue the lessor for breaches, committed subsequently to the assignment, of such of the lessor's covenants as run with the land.⁸ The doctrine of covenants

¹ *Brewer v. Hill*, 2 Anst. 418.

² Com. Dig. tit. Covenant (C), 8; Bull. N. P. 159.

³ *Doe v. Roe*, 5 Esp. 195.

⁴ *Moores v. Choat*, 8 Sim. 508; *Robinson v. Rosher*, 1 Y. & C. C. 7. See *Lucas v. Comerford*, 1 Ves. 23; *Williams v. Evans*, 23 Beav. 239.

⁵ *Cox v. Bishop*, 8 De G. M. & G. 815. But see *Close v. Wilberforce*, 1 Beav. 112.

⁶ *Williams v. Besanquet*, 1 B. & B. 238; *Burton v. Barclay*, 7 Bing. 745, 761.

⁷ *Southwark v. Smith*, 1 W., Bl. 351. See *Hawkins v. Sherman*, 3 C. & P. 459.

⁸ *Lewes v. Ridge*, Cro. Eliz. 863. The assignee succeeds to the lessee's rights to compensation for

improvements or new erections made upon the premises which the lessor has covenanted to pay for. *Hunt v. Danforth*, 2 Curtis, (U. S.) 592. In *Wrey v. Lemon*, 81 Penn. St. 273, A bought a lease from B under an agreement that B should refund any charge that A should be put to by reason of his purchase. The owner of the freehold recovered against him in ejectment, and, to remain in possession, he was obliged to take a new lease at an increased rent. It was held, that B was liable for the increase. In *Bender v. George*, 92 Penn. 86, A gave B a lease for a term of years. C and D were B's sureties. B assigned the lease to E, who assigned it to F, for whom H became security as

running with the land applies only to covenants which are annexed to the estate by the indenture which creates the estate, and it seems that there is no case in which a mere assignment of a parol tenancy has been held to pass to the assignees the right to enforce collateral stipulations, unless the landlord has consented to the substitution of the assignee in the place of the original tenant, so as to create a new contract between them upon the terms of the previous tenancy.¹ The assignee of part of the premises is liable to an action on every covenant running with the land and affecting such part.² He is not chargeable as assignee of the land for the entire rent,³ but after an assignment by the lessee of his interest in part of the demised land, the lessor may distrain upon that part for the rent which has accrued due for the whole.⁴ He assumes all the liabilities of the lessee under such of the lease as run with the land, whether he goes in under a voluntary assignment by the assignee or under an assignment by operation of law,⁵ and succeeds to all

ball absolute for payment of the rent and performance of the covenants of the lease. F defaulted for the rent, and D was compelled to pay the same to A. He then brought an action, in the name of A, for the use of D, against H, and it was held that he could recover. Where one not the lessee of premises is found in possession thereof, the presumption is that he holds as assignee of the lessee. *Ecker v. Chicago, Burlington, &c., R. R. Co.*, 8 Mo. App. 228. Where a sublessee, before the expiration of the original lessee's lease, becomes the owner of the premises in fee-simple, he cannot recover for rent from such lessee. *Leibshutz v. Moore*, 70 Ind. 142; 36 Am. Rep. 182.

¹ *LUSH, J.*, in *Elliott v. Johnson*, L. R., 2 Q. B. at p. 127.

² *TINDAL, C. J.*, in *Wollaston v. Hakewill*, 3 M. & G. 322; Com. Dig. Tit. Covenant (C) 3; *Congham v. King*, Cro. Car. 221; *Stevenson v. Lombard*, 2 East, 580.

³ *Curtis v. Spitty*, 1 Bing. N. C. 760.

⁴ *D'Aquin v. Armant*, 14 La. An. 217; *Sutliff v. Atwood*, 15 Ohio St.

186; *Dorance v. Jones*, 27 Ala. 680; *McMurphy v. Minat*, 4 N. H. 251; *Wilson v. Watkins*, 3 Pet. (U. S.) 50. He is liable upon covenants for husbandry and repairs. *Gordon v. George*, 12 Ind. 408. The lessee for a year of a fulling-mill covenanted in the lease to pay \$300 rent, to repair the mill, machines and dam (deducting the expense out of the rent), and to deliver the same to the lessor, in good repair, at the end of the term. The lessor covenanted in the lease that, after the repairing of the dam, he would keep it in repair, and that the lessee should enjoy the premises quietly. Held, that the assignment of the lease, on the day of its date, did not authorize the assignee in his own name to sue the lessee for a breach of the covenants. *Allen v. Wooley*, 1 Blackf. (Ind.) 148. An assignment, though in writing, of an agreement to pay rent, contained in a written lease, does not operate as a transfer of the legal title thereto; and the assignor must, in a suit thereon by the assignee, be made a defendant to answer as to his interest. *Hopkins v. Organ*,

his rights under such covenants so long as he stands in the relation of assignee.¹ Where the assignee expressly covenants to perform *all* the covenants contained in the lease, he assumes the same position to the lessor, so far as liability upon such covenants are concerned, as the original lessee stood in, *whether the covenants run with the land or not.*² He may enforce against the lessor all covenants running with the land, as a covenant for a renewal of the lease,³ for further assurance,⁴ to supply the premises with water,⁵ to insure where the money is to be used in repairing or rebuilding the premises;⁶ or indeed any covenant that concerns the estate and consequently runs with the land.⁷

SEC. 333. Where covenants run with the land.—Where “assigns” are not mentioned.—Where a covenant in a

15 Ind. 188. An assignee is not liable where the word “assigns” is not used in the lease upon any covenant relating to things not *in esse* when the lease was executed. Thus, when the lease provided that the lessee should put in counters and shelving, “which said counters and shelving” and the lessor covenanted to purchase of the lessee such counters and shelving at the end of the term, for a reasonable price, and there was a clause in the lease providing that the lease should be binding upon the parties, “their executors and administrators,” but the word “assigns” was not used, it was held, that the lessee could not enforce the covenant as to the purchase of the counters and shelves, against an assignee of the lessor. *Hansen v. Meyers*, 81 Ill. 321; 25 Am. Rep. 282. See also, *Grey v. Cuthbertson*, 2 Chit. 482. But the rule is otherwise where the word “assigns” is used. *Hunt v. Danforth*, 2 Curtis (U. S.) 592. Where the right to the unexpired term of a lease, together with the movables on the premises, were sold under an execution against the lessee, and the leased premises were afterwards destroyed by fire, it was held, that the purchaser had no right of action against the lessor for the recovery of the rent which

had been paid to him on the distribution of the proceeds of the sale. *Hayden v. Heirs of Shift*, 12 La. An. 524.

¹ *Hintze v. Thomas*, 7 Md. 346; *Page v. Hughes*, 2 B. Mon. (Ky.) 445; *Sienteaud v. Jeanneaud*, 20 La. An. 327. He may sue a subtenant of his assignor for rents accruing subsequent to the assignment. *Patten v. Deshon*, 1 Gray (Mass.) 825. But his rights under the lease may be restrained by the terms of the assignment. *Halbert v. Bruce*, 2 A. K. Mar. (Ky.) 591.

² *Rawlings v. Duvall*, 4 H. & J. (Md.) 1; *Jackson v. Port*, 17 John. (N. Y.) 479, 239.

³ *Blackmore v. Boardman*, 28 Mo. 420, but the assignment of an *expired* lease, containing a covenant for renewal, does not give the assignee a right to enter upon the land. *Clason v. Rankin*, 1 Duer (N. Y. Superior Ct.) 337. Upon the point made in the text, see *Bamford v. Hayley*, 12 East, 464.

⁴ *Campbell v. Lewis*, 3 B. & Ald. 392; *Middlemore v. Goodale*, Cro. Car. 508; *Spencer v. Boyes*, 4 Ves. 376.

⁵ *Jourdain v. Wilson*, 4 B. & Ald. 267.

⁶ *Vernon v. Smith*, 5 B. & Ald. 1.

⁷ *Webb v. Russell*, 3 T. R. 402. See sec. entitled Covenants that Run with the Land.

demise of corporeal or incorporeal¹ hereditaments relates to a thing *in esse*, a part of the demise, the thing to be done by force of the covenant is *quodam modo* annexed and appurtenant to the thing demised, and goes with the land, and binds the assignee, although he is not bound by express words, and the word assigns is not used:² as covenants by the lessee to repair;³ to leave in repair;⁴ to pay rent;⁵ or render services in the nature of rent;⁶ to allow deductions out of rent;⁷ not to plough more than a certain quantity of land;⁸ to reside upon the demised premises during the demise;⁹ to use a house as a private dwelling-house only; or to use a building for the prosecution of a particular trade or business, or not to permit certain trades to be carried on, or things to be done therein;¹⁰ to insure against fire;¹¹ to pay compensation for damage done to the surface under a mining lease;¹² covenants for quiet enjoyment;¹³ and to pay taxes.¹⁴

SEC. 334. Where "assigns" are mentioned.—Where a covenant relates to a thing not *in esse* at the time of the demise, yet if it directly touches or concerns the thing demised,¹⁵ *and the word assigns is used in the covenant*, the assignee will be bound by, or may take advantage of it. The following covenants belong to this class:—Cov-

¹ Hooper v. Clark, L. R., 2 Q. B. 200; Martyn v. Williams, 1 H. & N. 817.

² Spencer's Case, 5 Coke, 16.

³ Windsor's Case, 5 Coke, 24; Wakefield v. Brown, 9 Q. B. 209, 228.

⁴ Matures v. Westwood, Cro. Eliz. 599; Martyn v. Clue, 18 Q. B. 661.

⁵ Stevenson v. Lombard, 2 East, 575; Parker v. Webb, 3 Salk. 5; Williams v. Bosanquet, 1 Br. & B. 238.

⁶ Vyvyan v. Arthur, 1 B. & C. 410; 2 My. & K. 541.

⁷ Baylye v. Offord, Cro. Car. 187.

⁸ Cockson v. Cock, Cro. Jac. 125.

⁹ Tatem v. Chaplin, 2 H. Bl. 183.

¹⁰ Wilkinson v. Rogers, 2 De G. J. & S. 62. A recital in a lease

that the premises "now are occupied and to be occupied as a lumber yard" runs with the land, and is broken by the erection of buildings by an assignee of the lease. De Forest v. Bryne, 1 Hilt. (N. Y. C. P.) 43.

¹¹ Vernon v. Smith, 5 B. & Ald. 1.

¹² Norval v. Pascos, 34 L. J. Ch. 82.

¹³ Noke v. Awder, Cro. Eliz. 873; Campbell v. Lewis, 3 B. & Ald. 892.

¹⁴ Kearney v. Post, 1 Sandf. (N. Y.) 597.

¹⁵ Spencer's Case, 5 Coke, 16 a; Thomas v. Hayward, L. R., 4 Ex. 311; Mayor of Congleton v. Pattison, 10 East, 185; Doughty v. Rowman, 11 Q. B. 444. But see Minshull v. Oakes, 2 H. & N. 798.

enants to build a wall,¹ or a house,² on the demised premises; to build a smelting mill on waste land not demised;³ to convey upon a railway, for making which, land is demised, all coal got in a certain colliery;⁴ to leave the land at the end of the term in as good condition as it was at the time of the demise; or not to assign without the consent in writing of the lessor.⁵

SEC. 335. *Covenants which will not run with land.*—If the thing to be done under the covenant is merely collateral to the land, and does not touch or concern the thing demised in any way,⁶ the assignee will not be

¹ Spencer's Case, 5 Coke, at p. 16 a.

² Doughty v. Bowman, 11 Q. B. 444; 47 L. J. Q. B. 111.

³ Sampson v. Easterby, 6 Bing. 644.

⁴ Hemmingway v. Fernandes, 13 Sim., 228.

⁵ Hooper v. Clark, L. R., 2 Q. B. 200.

⁶ Williams v. Earle, L. R., 3 Q. B. 789; as explained by BLACKBURN, J., in West v. Dobbs, 38 L. J. Q. B. at p. 291. On August 20, 1886, W owned certain oil-producing lands, subject only to the unexpired terms of leases theretofore given by his grantors. The Newburg Petroleum Company, by assignment, owned such leases, and on that day released and quit-claimed to W all its right, title and interest in such lands, without any reservation, and it put him into possession. In part consideration for this conveyance, W covenanted and agreed for himself with the company to pay and deliver to the company, its successors and assigns, upon the leased premises, the one-sixth part of all the oil and other mineral substances produced or pumped thereon or therefrom daily, as produced during the remainder of the terms granted in the leases. On September 8, 1886, such conveyance and agreement were duly recorded, and on that day W sold and conveyed to sundry parties all his interest in the different parts of such lands, and he put each grantee into possession of the part so conveyed. Thereafter and dur-

ing the terms of the leases, W's grantees produced large quantities of oil from the respective parts, but W and his grantees failed and refused to account to the N. P. Co. for such production, or to pay and deliver the one-sixth part thereof, as W agreed to do. The N. P. Co. brought its action against W and his grantees on W's agreement with the N. P. Co., and it sought to hold these grantees liable for the covenant of W. To the petition alleging such facts these grantees demurred. It was held, such agreement is personal to W, and did not run with the land so as to bind the grantees of W for his failure to perform such agreement. It is claimed that the plaintiff may hold the assignees of W by virtue of the principle in the first rule given in Spencer's case, 1 Smith Lead. Cas. *69: (1) "When the covenant extends to a thing *in esse*, parcel of the demise, the thing to be done by force of the covenant is *quo* annexed and appurtenant to the thing demised, and shall go with the land, and shall bind the assignee, although he be not bound by express words: but when the covenant extends to a thing which is not in being at the time of the demise made, it cannot be appurtenant or annexed to the thing which had no being." The plaintiff, as assignee of these leases, owned no part of these lands, and it had only a right, for a term of years, to produce or pump oil and other mineral substances on and from these lands. Subject to this right for such term

charged.¹ Therefore, covenants to build a house upon land not demised ;² to pay a collateral sum to the lessor or to a stranger ;³ not to hire a certain class of persons to work in a mill ;⁴ by the lessor to give the lessee an offer of pre-emption of an adjoining piece of ground ;⁵ not to permit a certain business to be carried on upon the demised premises, or within a certain distance thereof upon premises controlled by the lessee ;⁶ a condition for re-entry if the lessee or his assigns, or any occupier of the land demised, shall at any time during the term be lawfully convicted of committing any offence against the laws.⁷

SEC. 336. When the assignee's liability commences.—An assignee of a term may be sued on the covenants which run with the land, although he has not taken actual possession ;⁸ so the assignee of an assignee is liable, although he has not taken actual possession, for breaches of covenant happening after the assignment to him, and before any assignment over by him :⁹ so a mortgagee *by assignment* of the term, though not in possession, is liable to perform the covenants in the lease which run with the land.¹⁰ Where a lessee covenanted for himself and his

of years, W owned these lands, and all that was appurtenant thereto ; and when the plaintiff released and conveyed to W, without reservation, this right, and all the plaintiff's interest in the lands, and put him into possession of the same, and when it took W's agreement to pay and deliver to plaintiff the one-sixth part of what should be produced and pumped thereon and therefrom, there was no "thing *in esse*, parcel of the demise," that was "annexed and appurtenant to the thing demised," so as to bring this case within the first part of that rule in Spencer's case, and it seems to fall within the second part of that rule, and that the covenant binds "the covenantor, his executors or administrators, and not the assignee." W did not attempt to bind his assigns in express terms, and he did not make the payment of the one-sixth part of the production a charge on the land. Neither did the law make such payment or delivery a

lien upon the land, as it does in case of a tax on land. We need but to refer to the "much learning" upon this general subject collected in connection with Spencer's case, in 1 Smith Lead. Cas. *68 *et seq.* Newburg Petroleum Co. v. Weare, 44 Ohio St. 604.

¹ Thomas v. Hayward, L. R., 4 Ex. 811; Spencer's Case, 5 Coke, 16 a.

² Sampson v. Easterby, ante; Spencer's Case, ante.

³ Mayho v. Buckhurst, Cro. Jac. 438.

⁴ Mayor of Congleton v. Pattison, 10 East, 130.

⁵ Collison v. Lettsom, 6 Taunt. 224.

⁶ Thomas v. Hayward, L. R., 4 Ex. 811.

⁷ Stevens v. Copp, L. R., 4 Ex. 20.

⁸ Walker v. Reeves, 2 Doug. 461, n.; 8 id. 19; Babcock v. Scoville, 56 Ill. 461.

⁹ Taylor v. Shum, 1 Bos. & P. 21.

¹⁰ Stone v. Evans, Peake, Ad. Ca. 94; Burton v. Barclay and Per-

assigns to pull down certain old houses and build others within seven years, but did not perform the covenant, and after the end of seven years assigned, an action of covenant was held not to lie against the assignee because the breach was complete before the assignment, and the liability of the assignee depends solely upon the privity of estate; had the covenant, however, been broken after the assignment, as if the lessee had assigned before the seven years expired, the assignee would have been liable.¹ And he would have been liable to an ejectment for the forfeiture committed prior to the assignment to him, unless such forfeiture had been waived.² An assignee of a lease under seal remains liable upon all the covenants in the lease until he has assigned it by a valid assignment which is operative to convey his title; consequently, although he assigns by parol or by a writing not under seal, or which is not recorded, where those formalities are required, and his assignee does not enter, the original assignee still remains liable upon the covenants in the lease,³ and an assignee, although he has only been in possession for a day or two, cannot absolve himself from liability for rent by *abandoning* the possession. Thus, a lessee made a general assignment of all his property for the benefit of his creditors, and the assignee went into possession of a store leased by the lessee and sold the goods therein at auction, and then tendered the key to the landlord and abandoned the possession, but the court held, that having taken possession he was bound as assignee for the rent.⁴

SEC. 337. *Effect of an assignment over.*—An assignee being liable to the original lessor or his assigns only in respect of privity of estate, may get rid of such liability by an assignment over,⁵ except as to previous breaches;

kings, 7 Bing. 745; Williams v. Bosanquet, 1 Brod. & B. 238; overruling Eaton v. Jaques, 2 Doug. 425; Myers v. Burns, 33 Barb. (N. Y.) 401.

¹ Southwark v. Smith, 3 Burr. 1272; Grescott v. Green, 1 Salk. 199; Britton v. Vaux, Lutw. 109;

Hawkins v. Sherman, 3 C. & P. 459.

² Bennett v. Herring, 3 C. B. N. S. 370.

³ Sanders v. Partridge, 108 Mass. 556.

⁴ Dorrance v. Jones, 27 Ala. 630.

⁵ Valliant v. Dodemede, 2 Atk. 546; Pitcher v. Tovey, 12 Mod.

with respect to which he will continue liable both at law' and in equity.' Such an assignment may be made even to a beggar or to a married woman.' After such assignment over, the assignee will continue liable upon any express covenant entered into by him in the assignment to himself. The assignee of a term, declared against as such, has been held not to be liable for rent accruing after he had assigned over, though it was stated that the lessor was a party executing the assignment, and agreed thereby that the term, which was determinable at its option, should be absolute; 'yet if the breach had been continuing, it would have been otherwise: as on a covenant to repair within a certain time after notice, and the repairs not done according to such notice, though the premises were out of repair before the assignment.' A lessee, during his occupation, holds both by privity of estate and contract. His privity of estate terminates with the term and by an assignment he divests himself of this privity and transfers it to his assignee, because it is annexed to and passes with the estate. The assignee takes all the interest of his assignor, *and subject to all the covenants and conditions which are annexed to the estate, and run with the land*, and, so long as he remains in possession, must perform them,' and this embraces a covenant to pay the taxes assessed upon the lands.'

28; *Le Keux v. Nash*, 2 Stra. 1222; *Walker v. Reeves*, 2 Doug. 461, n.; 3 id. 19; *Taylor v. Shum*, 1 B. & P. 21; Co. Litt. 3 a, 356 b; *Boulton v. Canon*, Freem. 336; *Chancellor v. Poole*, 2 Doug. 764. He is only liable so long as he remains assignee, and he may at any time discharge himself from further liability by assigning over the term. *Armstrong v. Wheeler*, 9 Cow. (N. Y.) 88; *Childs v. Clark*, 8 Barb. (N. Y.) Ch. 52; *Bayley v. Freeman*, 1 Hilt. (N. Y. C. P.) 196. Nor is he liable for any breaches that accrued either *before* assignment to him, or *after* he has assigned. *Armstrong v. Wheeler*, ante; *Astor v. Hoyt*, 5 Wend. (N. Y.) 603; *Tillotson v. Boyd*, 4 Sandf. (N. Y. Superior Ct.) 516; *Carter v. Hammett*, 18 Barb. (N. Y.) 608; *Astor v. L'Amoureux*, 4

Sandf. (N. Y. Superior Ct.) 516; But the fact that the assignee is not in possession, but has sublet the premises to a tenant, who, by his order, has paid the rent to the lessor, does not relieve him from liability. *Carter v. Hammett*, ante.

¹ *Harley v. King*, 2 C. M. & R. 18; *Pitcher v. Tovey*, 1 Salk. 81.

² *Philipot v. Hoare*, 2 Atk. 219; Amb. 480; *Treade v. Coke*, 1 Vern. 165; 2 Eq. Ca. 47; *Onslow v. Corrie*, 2 Madd. 330.

³ *LeKeux v. Nash*, 2 Stra. 1231; *Taylor v. Shum*, 1 Bos. & P. 21; *Onslow v. Corrie*, 2 Madd. 330; *Cole Ejec.* 540.

⁴ *Chancellor v. Poole*, 2 Doug. 764.

⁵ Com. Dig. tit. Covenant (B.).

⁶ *Bedford v. Terhune*, 30 N. Y. 438.

⁷ *Post v. Kearney*, 2 N. Y. 394; *State v. Martin*, 14 Lea. (Tenn.) 42; 52 Am. Rep. 167.

Where the lessee assigned to A his interest in demised premises by indenture, executed by both parties, "subject to the payment of the rent and performance of the covenants and agreements reserved and contained in the original lease:" and A took possession and occupied the premises under this assignment, and before the expiration of the term assigned to a third person; after such assignment the lessee was called upon by the lessor to pay rent which the assignee had suffered to be in arrear; it was held, that the lessee could not maintain an action of covenant against A in respect of such breach, the words "subject to the payment of rent; &c.," being words of qualification and not words of contract.¹ If a man lease for years, and the lessee covenant for himself and his assigns to pay the rent, so long as he and they shall have the possession of the thing let, and the lessee assigns, and the term expires, and the assignee continues in possession afterwards; an action will lie against him for rent which accrues after the expiration of the term, for though he is not an assignee strictly according to the rules of law, yet he shall be accounted such an assignee as will make him liable to perform the covenants.² An executor or administrator of a lessee for years may, like any other assignee, assign the term and divest himself of all liability upon the privity of estate, but not upon the privity of contract:³ so may the assignees of a bankrupt lessee.⁴

SEC. 338. *Assignment of part of the land.*—An assignee of part of the land cannot be charged, in an action of debt, with the whole rent, but only for a proportionate part thereof.⁵ If an issue is taken on the usual allegation that all the estate of the lessee became vested in the assignee, and the proof shows that only a part of the estate became vested in him, it is a fatal variance, unless

¹ *Wolveridge v. Steward*, 1 Cr. & M. 644.

² *Bac. Abr. tit. Covenant (E)*, 3.

³ *Auriol v. Mills*, 4 T. R. 94; 1 Smith L. C. 660.

⁴ *Onslow v. Corrie*, 2 Madd. 330.

⁵ *Fulton v. Stewart*, 2 Ohio, 215;

Curtis v. Spitty, 1 Bing. N. C. 756; *Marceron v. Dowson*, 5 B. & C. 479.

amended. But an assignee of part is liable to a distress for rent due for the whole of the demised premises.'

An assignee cannot discharge himself of all his liability to the lessor or his assigns, unless he assigns the whole of the estate, for covenants running with the land are in their nature divisible; therefore, if he assigns a part only of the estate, he will remain liable for so much as remains in his hands.'

SEC. 339. *Rights of assignees of a term.*—Assignees of a term may sue the reversioner, or his assigns, for breaches of covenant running with the land which are committed by him or them after the assignment; and an assignee of a lease by estoppel is no exception to the rule.' But an assignee cannot have an action upon a breach of covenant before the assignment to him,' nor for the breach of any covenant which does not run with the land or the reversion, as a covenant to purchase improvements, &c., at the end of the term, at a valuation.'

SEC. 340. *By way of mortgage.—Mortgagee's liability.*—A mortgagee of a leasehold estate *by assignment* is liable, so long as he has *the legal estate*, to perform the covenants which are obligatory on any ordinary assignee, whether he is in possession or not: and he may assign it without being in actual possession; but where he has merely an equitable estate, he is not liable for rent unless he is in actual possession.' A mortgagee may avoid the liability of an assignee by taking an underlease instead of an

¹ Hare v. Cator, Cowp. 766; Holford v. Hatch, 1 Doug. 183; Curtis v. Spitty, 1 Bing. N. C. 756.

² Congham v. King, Cro. Car. 221; Gamon v. Vernon, 2 Lev. 281; Stevenson v. Lombard, 2 East, 576; Twynam v. Pickard, 2 B. & Ald. 105; Mercer v. Dowson, *supra*; Badeley v. Vigurs, 4 E. & B. 71.

³ Bac. Abr. tit. Covenant (E), 5.

⁴ Cuthbertson v. Irving, 4 H. & N. 742; 6 id. 135.

⁵ Lewis v. Ridge, Cro. Eliz. 863; Martyn v. Williams, 1 H. & N. 817.

⁶ Gorton v. Gregory, 3 B. & S. 90.

⁷ Stone v. Evans, Peake, Ad. Ca. 94; 7 East, 341; Williams v. Bosan-

quet, 1 Brod. & B. 238; Westerdell v. Dale, 7 T. R. 812; Burton v. Barclay and Perkins, 7 Bing. 745; Wilson v. Watkins, 3 Pet. (U. S.) 50; Murphy v. Minot, 4 N. H. 251. But in New York, and indeed in all the States, where the mortgagee is treated as taking only an equitable estate, he is not liable as assignee unless he is in possession. Astor v. Hoyt, 5 Wend. (N. Y.) 603; Johnson v. Sherman, 15 Cal. 287.

⁸ Smartle v. Williams, 3 Lev. 388.

⁹ McKee v. Angelrodt, 16 Mo. 288.

assignment, and this is frequently done. If he becomes assignee, equity will not afford him any relief, though he may offer to forego his charge and lose his money.¹ If, however, he has never been in possession, the court will not entertain a bill to discover whether the lease has been assigned to him, but will leave the plaintiff to recover at law as well as he can.² A trustee to whom a lease is assigned to secure an annuity to a third person is strictly an assignee.³ A power given to a trustee in a mortgage deed to sell if the mortgagee requests it, does not necessarily imply a right to enter on the premises.⁴

SEC. 341. **Equitable assignments by deposit.**—A species of *quasi* assignment may be made by a deposit of the lease as a security for money advanced;⁵ but this will not have the effect of giving the creditor any legal title.⁶ In one case where the creditor had taken possession of the premises, it was held to amount to an equitable assignment of the term, which enabled the lessor to maintain a bill in equity against the creditor for the specific performance of covenants running with the land.⁷

SEC. 342. **Election by trustees to accept or disclaim a lease.**—It seems that trustees under a deed of assignment for the benefit of creditors of all the debtor's property may elect to accept, or to reject and disclaim, any lease or agree-

¹ Anon., Freem. Ch. 253; Cash-berd v. Att.-Gen., 6 Price, 411; Sparkes v. Smith, 2 Vern. 275.

² Sparkes v. Smith, ante. In Johnson v. Sherman, 15 Cal. 287, it was held that even a mortgagee in possession is not liable upon the covenant in the lease. In England, and indeed in all those States where the mortgagee is treated as taking the legal estate under his mortgage, he would be treated as assignee from the delivery of his mortgage; but in those States where he is treated as taking only a chattel interest in the property, he is not treated as assignee until he takes possession. Astor v. Hoyt, ante. In Trimm v. Marsh, 54 N. Y. 599, a mortgage of the lease was held not to operate as a

breach of a covenant not to assign, as a mortgage is a mere security and does not convey the legal title. See also, to the same effect, Riggs v. Russell, 66 id. 193.

³ Gretton v. Diggles, 4 Taunt. 766.

⁴ Watson v. Waltham, 2 Ad. & El. 766.

⁵ Williams v. Evans, 28 Beav. 239; Matthews v. Goodday, 8 Jur. N. S. 90; Bulfin v. Dunne, 12 Ir. Ch. R. 67.

⁶ Maslin v. Roe, 5 Esp. 105.

⁷ Lucas v. Comerford, 1 Ves. 235. But see Moores v. Choat, 8 Sim. 508 (overruling Flight v. Bentley, 7 Sim. 149); Close v. Wilberforce, 1 Beav. 112; Cox v. Bishop, 8 De G. M. & G. 815.

ment for a lease which forms part of such property, and that they are entitled to a reasonable time to make such election. They are not bound to accept a lease of which they were ignorant when they executed the assignment, and which they think likely to be injurious to the creditors; but it is for the jury to say whether they have done anything which amounts to an election to accept the lease. If they act in such a manner as to render the premises of less value to the lessor, or deal with the property as if the lease were vested in them, they will probably be held personally liable for the rent and covenants.¹ If they elect to reject a lease of no value, the debtor will continue tenant. If the lease is under seal, and the words of the assignment are sufficient to comprise it, it would be safer for the trustees to re-assign it to the debtor or to assign it over (even to a pauper) before any of the rent becomes due. Where a lease by deed forms part of the property assigned, the trustees for creditors will be liable as assignees without any entry, in like manner as mortgagees. Trustees for the benefit of creditors are not liable to an action for use and occupation until after they have entered to take possession or done some equivalent act, but it is otherwise in an action of covenant or debt for rent, wherein they are sued as assignees of the term.²

SEC. 343. What property passes by general words in such assignments. — Where a lessee of premises assigned, for the benefit of his creditors, all and singular his stock in trade, &c., and all other his personal estate and effects whatsoever, and the assignees were to pay the rent accruing due up to a future day named, it was held that the lease passed under the assignment.³ So a deed of assignment by A, of all his personal estate and effects whatsoever, to trustees for the benefit of his creditors, passes leasehold premises assigned to A by way of mortgage, with

¹ *Carter v. Warne*, 4 C. & P. 191; (N. Y.) 135; *Young v. Peyser*, 3 id. 308.
Ringer v. Cann, 3 M. & W. 343.

² *Howe v. Kennett*, 3 Ad. & El.
³ *Ringer v. Cann*, 3 M. & W. 343.
 659; *Martin v. Pinckney*, 8 Bos.

power of sale.¹ Where a tenant assigned all his household goods, &c., and "all his tenant right and interest yet to come and unexpired" in and to the farm and premises, it was held that the tenant's interest in crops not yet sown passed.² An assignment for benefit of creditors by a trader and farmer of all her "effects, stock, books and book debts," conveys the cattle on the farm.³

SEC. 344. Underlease.—Distinction between, and assignments.—An underlease is a demise by a lessee (or his assignee) for a less term than he himself has; a demise for the whole term amounts to an assignment.⁴ If a lessee for three years make a lease for five years, it will operate as an assignment and not as an underlease.⁵ But it may be construed, as between the parties themselves, to be an underlease rather than an assignment, where that is necessary to carry into effect their obvious intentions: this, however, is an exception to the general rule.⁶

An underlease for years made by a lessee for years, to commence immediately on his death, is good, if he dies during his own term; therefore, a man possessed of a term for twenty years may grant the lands for nineteen years to commence after his death, and it will be good for so many of the twenty years as shall be unexpired at the time of his death. Where a lessee has power to renew his term upon giving six months' notice of his intention before its expiration, and upon his preparing a new lease, &c., he cannot, though he gave notice of such intention, demise the premises to another party beyond the expiration of the first term, unless he prepares such new lease and gets it executed, or at least endeavors so to do.⁷ An injunction will be granted to restrain a tenant from subletting the premises without the consent

¹ West v. Steward, 14 M. & W. 47.

² Petch v. Tutin, 15 M. & W. 110; Congreve v. Evetts, 10 Exch. 298; Hope v. Hayley, 5 E. & B. 880, 846. But see Gale v. Burnell, 7 Q. B. 850.

³ Lewis v. Rogers, 1 C. M. & R. 48.

⁴ Hicks v. Downing, 1 Ld. Raym. 99; Wollaston v. Hakewill, 3 M. & G. 297.

⁵ Bull. N. P. 136.

⁶ Pollock v. Stacy, 9 Q. B. 1033; Williams v. Hayward, 1 E. & E. 1040; Preece v. Corrie, 5 Bing. 24; Baker v. Gostling, 1 Bing. N. C. 19; In Re Turner, 11 Ir. Ch. R. 302.

⁷ Mackay v. Mackreth, 2 Doug. 218.

of the landlord. Where the tenant has covenanted not to sublet without such consent, and it is of no importance, whether the landlord will be injured by such subletting or not.¹ The landlord has made the terms upon which he will let the premises, and the lessee having covenanted not to do certain acts, which the landlord in the lease says he shall not do, a court of equity will, in a proper case, restrain him from violating his covenant.²

SEC. 345. Sales of underleases.—A contract to sell a lease is not satisfied by the conveyance of an underlease, for the underlease might become void if the covenants and conditions in the original lease were not duly performed.³ But on the purchase of an underlease it is not a valid objection to the title that the underlease may become forfeited by the non-performance of the covenants in the original lease.⁴ It is the duty of a person contracting for an underlease to ascertain the contents of the original lease.⁵ So, also, a purchaser of leasehold property is bound to inform himself of the contents of the lease, and cannot avoid specific performance on the ground that it

¹ *Barrington Apartment Association v. Watson*, 88 Hun (N. Y.) 545. In this case the plaintiff, owning an apartment house, leased rooms to the defendant, Stewart, with a covenant that he should not sublet without consent, and that consent being once given, a fresh consent should be obtained for every subletting by sublessees. Consent was given for a sublease to the defendant, Watson, and he threatening to sublet without consent, it was held that an injunction against such subletting might issue. The court, BRADY, J., said: "The learned justice in disposing of the motion expressed himself elaborately, and in an opinion which clearly and satisfactorily disposes of the questions involved. His judgment was founded upon a conclusion justified by the evidence submitted to him, that the appellant not having obtained from the plaintiff its consent to subletting the premises occupied by him, his attempt to do so was a violation of the covenant. And that

conclusion disposes of the whole case. The learned counsel for the appellant seems to think it was necessary to show the contemplated act, one which would occasion injury, and that none was shown, nor was it demonstrated that irreparable damage would result from the act designed; which was necessary in order to entitle the plaintiff to the injunction sought. This may be regarded as the general rule. *T. & B. R. Co. v. B. H. T. & W. R. R. Co.*, 86 N. Y. 107. But courts of equity very frequently grant injunctions in the nature of a specific performance to restrain the violation by a tenant of his agreement."

² *Eden on Injunctions*.

³ *Madeley v. Booth*, 2 De G. & S. 718; *Darlington v. Hamilton*, Kay, 550; *Blake v. Phinn*, 3 C. B. 976; *Muston v. Gladwin*, 6 Q. B. 953; *Logan v. Hall*, 2 C. B. 598.

⁴ *Hayford v. Criddle*, 22 Beav. 277.

⁵ *Cosser v. Collinge*, 3 Myl. & K. 288.

contains an unusual covenant (not to exercise certain trades, &c.,) which was not mentioned in the particulars of sale, or at the sale. An underlease should always contain an express covenant by the underlessee, to observe and perform all the covenants and conditions in the original lease, except those which he is not to perform. It is not sufficient that he enters into *similar* covenants, copied *verbatim* (except as to names, &c.,) from the original lease, although this is frequently done.¹

SEC. 346. *Effect of re-assignment.*—The assignee may rid himself of all future liability *to the lessor* for rent, and the covenants in the original lease, by re-assigning the lease to any person.² He may do this without giving notice to the lessor, or obtaining his leave;³ and, notwithstanding a covenant in the original lease, that the lessee, his executors or administrators, should not assign without the license of the lessor.⁴ There is no fraud in the assignee of a lease re-assigning his interest with a view to getting rid of the lease; hence he may re-assign it to a beggar,⁵ or a married woman,⁶ or a person leaving the kingdom,⁷ for the express purpose of relieving himself of liability under the covenants. It is not even necessary that the person to whom the re-assignment is made should take possession of the premises, or assent to the lease.⁸ In one case it was held that a re-assignment of a lease might be lawfully made to a prisoner in a Fleet, who was paid a sum of money to accept of the assignment.⁹

SEC. 347. *Continued liability of lessee.*—A *lessee* cannot, by assigning his lease, rid himself of liability under the

¹ Grosvenor v. Green, 5 Jur. N. S. 117; Logan v. Hall, 2 C. B. 598; Walker v. Hatton, 10 M. & W. 229; Penley v. Watts, 7 M. & W. 601; Clow v. Brogden, 2 M. & G. 39.

² Paul v. Nurse, 8 B. & C. 486; Odell v. Wake, 3 Camp. 394; Chancellor v. Poole, 2 Dougl. 764.

³ Valliant v. Dodemede, 2 Atk. 546; Le Keux v. Nash, 2 Stra. 1221; Onslow v. Corrie, 2 Madd. 330.

⁴ Paul v. Nurse, 8 B. & C. 486.

⁵ Taylor v. Shum, 1 B. & P. 21, 23. See Odell v. Wake, 3 Camp. 394.

⁶ Barnfather v. Jordan, 2 Dougl. 452.

⁷ Per EYRE, C. J., Taylor v. Shum, 1 B. & P. 23.

⁸ Taylor v. Shum, ante.

⁹ Valliant v. Dodemede, 2 Atk. 546.

covenants. The effect of an assignment is to make the lessee a surety to the lessor for the assignee; who, as between himself and the lessor, is the principal, bound whilst he is assignee to pay the rent and perform the covenants.¹ If the lessor, tacitly or expressly accepts the assignee as his tenant, it appears that an action of *debt* for rent will not lie against the lessee;² but if the lease contains an express covenant by the lessee, an action on such covenant may be brought against him or his executor³ at any time during the term, notwithstanding the lessee has assigned his interest and parted with the possession of the premises, and the lessor has received rent from the assignee.⁴ The lessor may sue either the lessee or his assignee, or both at the same time, but he can have execution against only one of them.

SEC. 348. *Rights and liabilities of assignee as against lessee.*—To protect themselves from this continued liability, lessees, on assigning their leases, are entitled to require the assignees to indemnify them against future payment of rent and performance of covenants. Even executors, who cannot be compelled to enter into the ordinary covenants for title, may require a covenant of indemnity from their assignees.⁵ Upon a covenant of indemnity, contained in the assignment, the assignee will be liable to the lessee during the residue of the term, he cannot relieve himself from this liability by re-assigning the lease. An assignee who has covenanted to indemnify the lessee against the covenants in the lease may, on re-assigning the lease, require a similar covenant from his assignee.⁶

During the continuance of the interest of each successive assignee, there is a duty on his part to pay the rent

¹ LORD DENMAN in *Wolveridge v. Steward*, 1 Cr. & M. 659; PARKE, B., in *Humble v. Langston*, 7 M. & W. 530.

² *Auriol v. Mills*, 4 T. R. 98. See *Wadham v. Marlowe*, 8 East, 314, note (c).

³ *Bret v. Cumberland*, Cro. Jac. 521. See *Bachelour v. Gage*, Bro. Car. 188.

⁴ *Barnard v. Godscall*, Cro. Car. Jac. 309. See *Auriol v. Mills*, 4 T. R. 98; *Staines v. Morris*, 1 V. & B. 11; *Orgill v. Kemshead*, 4 Taunt. 642.

⁵ *Staines v. Morris*, 1 V. & B. 8. As to the construction of covenants of indemnity, see *Crossfield v. Morrison*, 7 C. B. 236.

⁶ See *Staines v. Morris*, 1 V. & B. 8.

and perform the covenants.¹ If the lessee, in his capacity of a surety as between himself and the assignee for the payment of rent and performance of covenants, has paid the rent or discharged the obligation, he has his remedy over against the principal;² and he has the remedy over against each subsequent assignee, in respect of breaches committed during the continuance of the interest of each of them; for the lessee is in effect a surety for each of them to the lessor.³ The assignee is liable for a breach of any covenant running with the land, incurred in his own time, though the action is not commenced until after he has assigned the premises.⁴ A lessee who has paid the rent to the landlord, may recover the same of his assignee, but not otherwise.⁵ The lessee notwithstanding the assignment of his entire interest in the estate, is liable to the lessor on his covenants to pay rent;⁶ and the assignee is also liable to the lessor for the performance of all the covenants which run with the land by virtue of the privity of estate created by the assignment. Both are liable, and the lessor has the option to sue either. When the lessee is obliged to pay, by reason of his covenants to pay rent, the question arises, what are his rights against the assignee who has not performed his duty, but has taken the whole benefit of the lease.⁷

¹ See *Wolveridge v. Steward*, 1 Cr. & M. 659; *Mule v. Garrett*, L. R., 5 Ex. 182.

² *PARKE, B.*, in *Humble v. Langston*, 7 M. & W. 590; *Burnett v. Lynch*, 5 B. & C. 589; *Wolveridge v. Steward*, 1 Cr. & M. 659.

³ *Mule v. Garrett*, 89 L. J. Ex. 73; *Wolveridge v. Steward*, 1 Cr. & M. 660.

⁴ *Burnett v. Lynch*, 5 B. & C. 589; *Harley v. King*, 2 Cr. M. & R.

⁵ *Farrington v. Kimball*, 126 Mass. 313; 80 Am. Rep. 680.

⁶ *ENDICOTT, J.*, in *Farrington v. Kimball*, ante; *Wall v. Hinds*, 4 Gray (Mass.) 256; *Blake v. Sanderson*, 1 id. 332; *Sanders v. Partridge*, 108 Mass. 556.

⁷ It was said in general terms by Chief Justice *SHAW* in *Patten v. Deshon*, 1 Gray (Mass.) 325, 330,

that "the first lessee, notwithstanding the assignment, remains liable for the rent, in virtue of his express covenants if the lessor elects to hold him, in which case he will be entitled to the rent from the assignees." The leading case in England is *Burnett v. Lynch*, 5 B. & C. 589, where it was held that a lessee, who had assigned the lease by a deed poll, and had been compelled to pay damages to the lessor for breach of the covenants of the lease while his assignee was in occupation, could maintain an action against the assignee for having neglected to perform the covenants whereby the lessee suffered damage. *LORD DENMAN*, in commenting on this case, when delivering the judgment of the Exchequer Chamber, in *Wolveridge*

SEC. 349. Rights as to title.—Unless there is an express stipulation to the contrary, every contract for the sale of a lease contains an implied undertaking, available at law as well as in equity to make out the lessor's title to demise as well as that of the vendor to the lease itself.¹ But upon the sale of an agreement for a lease, there is

v. Steward, 1 Cr. & M. 644, 660, stated that "the effect of the assignment is, that the lessee becomes a surety to the lessor for the assignee, who, as between himself and the lessor, is the principal, bound, whilst he is assignee, to pay the rent and perform the covenant running with the estate; and the surety after paying the debt, or discharging the obligation to which he is liable, has his remedy over against the principal. And he would also, in all probability, have the same remedy over against each subsequent assignee, in respect of breaches committed during the continuance of the interest of each, for the lessee is, in effect, a surety for each of them to the lessor." And *BARON PARKE*, who took part in that judgment, afterward, in *Humble v. Langston*, 7 M. & W. 517, 530, also expressed the opinion that the lessee was liable in the nature of a surety, as between himself and the assignee, for the performance of the covenants of the lease. In *Moule v. Garrett*, L. R., 5 Ex. 132, the assignee, for whose breach of the covenants of the lease the lessee was obliged to pay, did not take directly from the lessee, but was second assignee, and the question suggested by *LORD DENMAN* arose as it does in the case at bar. It was held that there was an implied promise on the part of each successive assignee of a lease to indemnify the original lessee against breaches of covenant in the lease committed by each assignee during the continuance of his own term. The decision was afterward affirmed in the Exchequer Chamber. L. R., 7 Ex. 101. *CHIEF JUSTICE COCKBURN*, while conceding that the defendants might be held on the ground of implied contract, was of opinion that the liability of the assignee might

be put on another and preferable ground, namely, that when one person is compelled to pay damages for the legal default of another, he is entitled to recover from the person by whose default the damage was occasioned, the money so paid, and that it was a matter of indifference whether the liability rested on an implied contract or on an obligation imposed by law; it was a duty the law enforces, *MR. JUSTICE WILLES* stated his concurrence in this concise language: "I am of the same opinion, on the ground that where a party is liable at law by immediate privity of contract, which contract also confers a benefit, and the obligation of the contract is common to him and to the defendant, but the whole benefit of the contract is taken by the defendant, the former is entitled to be indemnified by the latter in respect of the performance of the obligation." Assuming, therefore, that a lessee may maintain an action against an assignee on either of the grounds suggested in these cases, it is very clear that he can do so only after he has paid the lessor for breach of the covenants of the lease by the assignee. If he is a surety, then he must pay the debt for which he is liable before he can recover of the principal. *Hoyt v. Wilkinson*, 10 Pick. (Mass.) 31. If it is a debt imposed upon him by the default or act of the assignee, it must of course be discharged before the liability of the assignee accrues. Until the debt is discharged the lessee has no right of action against the assignee, and no recovery can be had for rent which has not been paid by the lessee.

¹ *LD. DENMAN*, C. J., in *Souter v. Drake*, 5 B. & Ad. 1002; *Purvis v. Rayer*, 9 Price, 488.

no implied contract that the lessor has power to grant the lease.¹

SEC. 350. **Grant by the landlord of his reversion.**—By the statute 32 Henry 8, chapter 34, sections 1 and 2, it is provided that upon a grant by deed by a landlord of his reversion, the grantees, “and the heirs, executors, successors and assigns of every of them, shall have like advantages against the lessees, their executors, administrators and assigns, by entry for non-payment of rent, or for doing of waste or other forfeiture; and the same remedies by action for not performing of other conditions, covenants or agreements (running with the land) contained in the indentures of their said leases, as the said lessors themselves, or their heirs or successors had.”

All lessees of hereditaments for term of years, life or lives, their executors, administrators and assigns, shall have like remedy against all persons and bodies politic, their heirs, successors and assigns, who shall have any gift or grant of the reversion of the same hereditaments, or any parcel thereof, for any condition, covenant or agreement contained in the indentures of their leases, as the same lessees might have had against the said lessors, their heirs and successors.²

SEC. 351. **Conveyances good without attornment of tenant.**—By 4 Anne, chap. 16, section 9, all grants or conveyances, of any manors or rents, or of the reversion or remainder of any messuages or lands, shall be good and effectual without any attornment of the tenants of any such manors, or of land out of which such rent shall be issuing, or upon whose estates any such reversions or remainders shall be expectant or depending; and by section 10 it is provided that no such tenant shall be prejudiced or damaged by payment of any rent to any such grantor, or by breach of any condition for non-payment of rent, before notice shall be given to him of such grant by the grantee.

¹ *Kintrea v. Perston*, 1 H. & N. 357.

² *Standen v. Christmas*, 10 Q. B. 185; *Webb v. Russell*, 3 T. R. 393.

SEC. 352. **Effect of death of the lessor.**—Arrears of rent accrued and payable in the lifetime of the landlord go to his executor or administrator as part of his personal estate.¹ Executors may sue upon any covenant with the testator which has been broken in his lifetime.² But where the covenant runs with the land and descends to the heir, though there may have been a formal breach in the ancestor's lifetime, yet if the substantial damage has taken place since his death, the heir is the proper plaintiff.³

SEC. 353. **Death of lessee.**—Upon the death of a tenant from year to year, or for a term of years, the lease vests in his executor or administrator.⁴ Even where a term of years is specifically bequeathed, it will, in the first instance, vest in the executor, by virtue of his office, for the usual purposes to which the testator's assets are applied, and the legatee has no right to enter without the executor's special assent.⁵ The executor or administrator cannot, generally speaking, refuse the lease, though it is worth nothing, for he must renounce the executorship *in toto* or not at all;⁶ but if the value of the land is less than the rent, and there is a deficiency of assets, he may waive the lease.⁷ He is liable, to the extent of the lease for arrears for rent accruing and breaches of covenant committed during the life of the tenant.⁸ Although the executor or administrator does not enter into possession of the demised premises, he may be sued as assignee of the lease for rent due and breaches of covenant committed subsequently to the death of the lessee.⁹ But he may, by proper pleading, discharge himself from personal liability, by alleging that he is no otherwise assignee than by being executor or administrator of the lessee, and that he has never entered or

¹ See 1 Williams on Exors. 783; Dollen v. Batt, 4 C. B. N. S. 760.

² Raymond v. Fitch, 2 Cr. M. & R. 588; Ricketts v. Weaver, 12 M. & W. 718.

³ Kingdon v. Nottle, 1 M. & S. 855. See 2 Cr. M. & R. 598.

⁴ Doe v. Porter, 3 T. R. 18; James v. Dean, 15 Ves. 241.

⁵ 1 Williams on Exors. 601.

⁶ DENMAN, C. J., in Rubery v. Stevens, 4 B. & Ad. 244.

⁷ 2 Williams on Exors. 1591.

⁸ Id. 1587.

⁹ Wollaston v. Hakewill, 3 M. & Gr. 297, 320.

taken possession of the demised premises ; and he may also discharge himself from all liability as executor, by alleging that the term is of no value, and that he has fully administered all the assets which have come to his hands.¹ If the executor or administrator enters upon the demised premises, he becomes personally liable, so long as he continues in possession, for so much of the rent accruing due after the testator's death as the premises are worth,² i. e., the amount of rent for which they could have been let.³

When an executor is sued for use and occupation in his own right, he must show that his occupation is as executor, and that he entered in that character ; that he has no assets, and that the value of the land is not equal to the rent. Where the land yields some profit, but less than the rent, he may tender the amount of profit and plead a tender, or he may pay it into court.⁴ The executor is liable to the same extent as any other assignee for any breaches of the covenants in the lease committed since the death of the tenant.⁵ But by assigning the term the executor or administrator may free himself from liability for subsequent rent and breaches of covenant.⁶

¹ Id. 821.

² See 1 Wms. Saund. 112, note (c) ; Rubery v. Stevens, 4 B. & Ad. 241 ; Hopwood v. Whaley, 6 C. B. 744 ; Hornidge v. Wilson, 11 Ad. & El. 645.

³ Hopwood v. Whaley, 6 C. B. 744.

⁴ Patten v. Reid, 6 L. T. N. S. 281.

⁵ Tremeere v. Morison, 1 Bing. N. C. 89, 97 ; Sleaf v. Newman, 13 C. B. N. S. 116. See Buckworth v. Simpson, 1 Cr. M. & R. 884.

⁶ Taylor v. Shum, 1 B. & P. 21. See Collins v. Crouch, 13 Q. B. 542.

CHAPTER XXXIV.

PARTICULAR COVENANTS.—QUIET ENJOYMENT.

- SEC. 354. Covenants for quiet enjoyment.
- SEC. 355. No implied covenant or promise when an express one.
- SEC. 356. Cessor of implied covenant.
- SEC. 357. Form of usual qualified covenant for quiet enjoyment.
- SEC. 358. Unqualified covenant for quiet enjoyment.
- SEC. 359. Any express covenant excludes an implied one.
- SEC. 360. Decisions on express covenants for quiet enjoyment.
- SEC. 361. What is a breach of.
- SEC. 362. Damages for breach of covenant.
- SEC. 363. On whom binding.
- SEC. 364. Breaches.—How plead.

SEC. 354. Covenants for quiet enjoyment.—The object of a covenant for quiet enjoyment is to afford to the lessee an assurance against the consequences of a defective title, and consequently it necessarily imports that he shall enter and enjoy the premises without the permission of any one; therefore, if any other person is in possession of the premises, either under a person having a better title thereto than the lessor, or under a lease or deed from the lessor, and the lease takes effect *in presenti*, there is an immediate breach of the covenant, and an action lies therefor at once.¹ But the covenant is not

¹ Garfield v. Williams, 2 Vt. 327. In King v. Reynolds, 67 Ala. 229, it was held that when there is no stipulation to the contrary in the lease the lessor impliedly covenants, that the demised premises shall be open to entry by the lessee, at the time fixed by the contract for him to take possession. But if after the time when the lessee is entitled to possession under the lease whether he has actual

possession or not, a stranger trespasses on, or takes possession of and holds the lands, this is a wrong to the lessee for which the lessor is not responsible. When in an action by a lessee against his lessor, for a breach of the implied covenant to deliver possession, the evidence is conflicting, as to whether a trespasser was in possession of the lands, at the time fixed in the lease for taking possession, it is

broken because of the entry of a mere tortfeasor or,

error to refuse a charge which submits this question to the jury. In *Snodgrass v. Reynolds*, 79 Ala. 452, it was held that, as between lessor and lessee where the latter sues for the breach of an express stipulation to put him in possession, the general rule must govern though the lessor was guilty of no fraud or wrongful conduct; and the measure of damages is, not the consideration paid, with interest, but the value of the lease. The leased premises consisting of a meadow of about thirty acres, sown in "Johnson grass," a crop of which was then ready to be mowed, the plaintiff may prove how many crops the land would produce each year with ordinary seasons, and the probable quantity and market value of each crop, not as a basis for the recovery of profits as such, but as facts to be considered by the jury in estimating the value of the use of the land during the term—that is, the value of the lease. When the possession of the leased premises is open and unobstructed at the time of the renting, and there is only an implied covenant on the part of the lessor that they shall be open to entry, a subsequent trespass or intrusion by a third person is a wrong against the lessee; but, if there is an express stipulation by the lessor to put the lessee in possession, such subsequent trespass, before the lessee has entered, is a wrong against the lessor. *Howell v. Richards*, 11 East, 633; *Ludwell v. Newman*, 5 Bing. 440; *Holder v. Taylor*, Hob. 12; *Hackett v. Glover*, 10 Mod. 142; *Cloak v. Hooper*, Freem. 122; *Levett v. Wirthington*, Sutw. 97. A contract for quiet enjoyment is implied under a parol demise of a tenement. *Bandy v. Cartwright*, 8 Ex. 913; *Hall v. City of London Brewery Co.*, 2 B. & S. 737. See *Granger v. Collins*, 6 M. & W. 458; *Messent v. Reynolds*, 3 C. B. 194. An action of Covenant will lie against the lessor upon the word "demise" in a lease by deed, for that word imports a covenant in law on the part of the lessor that he has good title, and that the lessee shall quietly enjoy during the

term. Per *LITLEDALE J.*, in *Burnett v. Lynch*, 5 B. & C. 609; *Iggulden v. May*, 9 Ves. 380. But this implied covenant ceases with the estate of the lessor; hence if, under a lease made by a tenant for life not containing any express covenant for quiet enjoyment the lessee is evicted by the remainderman after the death of the lessor, the lessee cannot maintain an action upon an implied covenant for quiet enjoyment against the executor of the tenant for life. *Adams v. Gibney*, 6 Bing. 656. See *Penfold v. Abbott*, 7 L. T. N. S. 384. A person who lets premises agrees to give possession, and not merely to give a chance of a lawsuit. *Coe v. Clay*, 5 Bing. 440. If he does not give possession the lessee may recover damages against him, and is not obliged to bring ejectment against an occupier who wrongfully refuses to quit. *Coe v. Clay*, 5 Bing. 440; *Jinks v. Edwards*, 11 Ex. 775. See *Drury v. Macnamara*, 5 E. & B. 612. One of the necessary consequences of the implied agreement on the part of every landlord for his tenant's quiet enjoyment is, that the landlord, if himself a lessee, shall, by paying over to the superior landlord the rent received from the undertenant, protect such undertenant from the superior landlord's distress. *Hancock v. Coffyn*, 8 Bing. 366; *Upton v. Ferguson*, 8 Moo. & Sc. 88. The covenant implied in the word "demise" will be qualified and restrained by an express covenant for quiet enjoyment. *Line v. Stephenson*, 4 Bing. N. C. 678; 5 Bing. N. C. 183. Hence, the lessee, upon an eviction by a paramount title, cannot recover under the implied covenant if the lease contains an express covenant for quiet enjoyment against the lessor and those who claim under him. *Merrill v. Frame*, 4 Taunt. 329. The implied indemnity is also limited to the wrongful entry of the lessor or of persons claiming under or paramount to him. *Smith, L. & T.* 285. No action will lie upon it for an eviction of the tenant by a stranger. *Andrew's Case*, Cro. Eliz. 214.

because of the premises being in the possession of a person having no right or title thereto. To sustain an action for a breach of this covenant it is necessary for the plaintiff to prove that he was evicted by a person who had a lawful and paramount title existing before or at the time that the covenant was made.¹ There must be an interruption by title; and a declaration that merely alleges an eviction by a trespasser is bad.² If the tenant enters into possession, the covenant for quiet enjoyment is not broken by a demand of possession by a person claiming to hold by, or having a superior title,³ nor by a mere trespass of the lessor.⁴ The covenant relates to the estate and title demised, and not to the person of the lessee; therefore the covenant is not broken by an entry by the landlord, and an assault and battery committed by him upon the tenant,⁵ nor by an entry of the landlord to repair, when he has covenanted to do so,⁶ nor by a notice to an undertenant not to pay the rent to the tenant,⁷ at least, unless the rent is withheld because of such notice.⁸ The destruction of the buildings by fire or other casualty, and a refusal by the landlord to repair or rebuild them, is not a breach of this covenant, as the covenant imposes no such obligation upon him.⁹

Whether a lease contains a covenant for quiet enjoyment or not, is, so far as the rights of the tenant are

¹ Knapp v. Marlboro, 84 Vt. 285; Ellis v. Welch, 6 Mass. 246; Frost v. Earnest, 4 Whart. (Penn.) 86; Hodgkin v. Queenborough, Willes, 18 n.; Gardner v. Keteltas, 3 Hill, (N. Y.) 380; Underwood v. Birchard, 47 Vt. 305; Hoppus v. Cheek, 21 Ark. 185.

² Rantin v. Robertson, 2 Strobb. (S. C.) 866.

³ Cowan v. Silliman, 4 Dev. (N. C.) L. 46. Especially is this the case where the person making the demand had no right to eject the tenant. Poole v. Whitt, 15 M. & W. 571. But if the person making the demand really had a paramount title, and threatened to expel the tenant, and in consequence of such threat the tenant attorned to him, this is equivalent to an expulsion. Poole v. Whitt, ante. And the

same is true if the tenant gives up possession to one having a superior title, on demand. Carpenter v. Parker, 8 C. B. N. S. 206.

⁴ Mayor, &c., v. Mabie, 18 N. Y. 151. But *contra* see Sedgwick v. Hollenbeck, 7 John. (N. Y.) 576.

⁵ Morgan v. Hunt, 2 Vent. 213; Penn v. Glover, Cro. Eliz. 421. An entry by one having no lawful claim at the time of the conveyance does not constitute a breach. Webb v. Alexander, 6 Wend. (N. Y.) 281.

⁶ Hodgkin v. Queenborough, ante.

⁷ Withcot v. Nine, 1 Br. & G. 81.

⁸ Anonymous, 1 And. 187.

⁹ Brown v. Quitter, 2 Ambl. 619. See *post*, Chapter on Repairs.

concerned, immaterial, as in all cases, unless otherwise expressly provided, the law will imply such a covenant. The rule is, that a covenant for quiet enjoyment is implied in every mutual contract for leasing land, by whatever form of words the agreement is made; and for the breach of such covenant, *occasioned through the fault of the lessor*, the lessee has his remedy for such damages as result to him therefrom.¹ In pursuance of this rule, it has been held that, where the damages arose from acts done by the landlord under a *valid* ordinance of a municipal government, the tenant could not charge the landlord with the damages, but, in order to shield himself from liability, the landlord must establish the validity of the ordinance, and failing to do so, or if the ordinance is in fact invalid, he is liable the same as though the act had been voluntary on his part.² The word "demise," in a lease, implies a covenant for quiet enjoyment. This word imports a covenant that the lessor had authority to make a valid lease of the premises (*Grannis v. Clark*, 8 Cow. 36); and a covenant for the quiet enjoyment of the premises

¹ *Mack v. Patchin*, 42 N. Y. 167; *Akerly v. Vilas*, 23 Wis. 207; *Eldred v. Leahy*, 81 Wis. 551; *Manville v. Gay*, 1 Wis. 250; *Varnum v. Smith*, 15 N. Y. 328; *The Mayor, &c., v. Mahie*, 11 Paige Ch. (N. Y.) 566; *Burwell v. Jackson*, 9 N. Y. 535; *Sigmund v. Bank*, 29 Md. 324; *Baughner v. Wilkins*, 16 id. 75. Even where a parol lease is made, an implied promise is raised that corresponds with the implied covenants that arise when the estate, right or interest is created by deed. Therefore, under a parol lease there is an implied promise from the lessor to put the lessee into possession, *Hart v. Windsor*, 12 M. & W. 85; *Coe v. Clay*, 5 Bing. 440, and to secure him the free and undisturbed possession thereof for the term for which the premises were let. *Bandy v. Cartwright*, 8 Exchq. 913; *Messent v. Reynolds*, 3 B. & C. 201. If there is a contract for the sale and purchase of a lease the law implies a promise from the vendor to establish and make good his title to the lease; *Doe v. Stanion*, 1 M. & W. 701;

Souter v. Drake, 5 B. & Ad. 993; *Hall v. Betty*, 5 Scott, N. R., 508; and when the purchaser has accepted the lease, the law implies a promise on the assignee's part to pay the rent reserved, and perform the covenants in the lease. *Burnett v. Lynch*, 5 B. & C. 602. Not only may a covenant for quiet enjoyment be implied, but the fact that the lessor has no title, or power or authority to let the premises, may amount to a fraudulent representation, which will form the basis of an action in favor of the tenant for the damages that result to him therefrom. In *Milliken v. Thorndike*, 103 Mass. 862, a false oral representation made at the time of the execution of the lease that the drains were where they were to be according to the plans, was held admissible in defence of an action for rent, although the defendant had entered and remained in possession a week before he discovered the fraud and quit possession. See, also, *Whitney v. Allaire*, 1 N. Y. 305.

² *Eldred v. Leahy*, 81 Wis. 550.

leased.¹ Though the covenant be an implied one, it may be stated according to its legal effect.² In an action upon such covenant, when the declaration does not allege an eviction of the plaintiff, nor the taking of anything from the premises leased, the action cannot be maintained.³

SEC. 355. No implied covenant or promise when an express one.—Any express covenant or promise in a lease, either for title or quiet enjoyment, however qualified or restricted, will prevent any more general covenant or promise on the same subject being implied by law, from the word “demise” or any equivalent word—the maxim being *expressum facit cessare tacitum*. The usual qualified covenant for quiet enjoyment is commonly inserted for the purpose of preventing a more general and unqualified covenant being implied by law. Where a person held under an agreement which amounted to an actual demise, subject to the same conditions as were mentioned in the memorandum under which the lessor held the premises, and it did not appear what those conditions were, it was held, that a contract for quiet enjoyment could not be implied.⁴ Where the plaintiff took of the defendant a house at a *yearly* rent, under an agreement by the terms of which the latter agreed that up to the date thereof he had paid all arrears of *rent*; and the former agreed that “from and after that day the *same* should be kept paid by him for the period he might occupy;” and at the expiration of the first quarter the superior landlord distrained: it was held, that there was no implied duty on the defendant to indemnify the plaintiff against this claim, although the agreement stipulated for a “*yearly*” rent, the defendant having by the subsequent clause expressly undertaken to keep the reserved rent paid.⁵ By writing not under seal, signed by the plaintiff and defendant, plaintiff agreed to take of defendant a farm at a yearly rent, “the tenancy to commence from the

¹ *Barney v. Keith*, 4 Wend. (N. Y.) 502; *Crouch v. Fowle*, 9 N. H. 219.

² *Dexter v. Manley*, 4 Cush. (Mass.) 14.

³ *Ware v. Lithgow*, 71 Me.

⁴ *Messent v. Reynolds*, 3 B. & C. 194.

⁵ *Upton v. Fergusson*, 3 Moo. & Sc. 88.

29th of September next, for a term of eight years, subject to a lease" to be drawn up by defendant; held, that there was no contract by the defendant *to give the plaintiff possession* of the farm on the day named; for that possession was to be given only on the commencement of a tenancy *under a lease for eight years*, and not under that agreement, which was void as a lease under the Statute of Frauds, nor under an implied tenancy at will, or from year to year, to be created by entry, or entry and payment of rent under that agreement.¹ But where there is an *actual demise* for one year or more, the lessor impliedly contracts to give the lessee possession at the commencement of the term, and if he fails to do so, by reason of a previous tenant wrongfully holding over, the lessee may recover damages, and is not driven to bring ejectment against the previous tenant.² By agreeing to grant a

¹ Drury v. Macnamara, 5 E. & B. 612; Brashier v. Jackson, 6 M. & W. 549.

² Coe v. Clay, 5 Bing. 449; Jinks v. Edwards, 11 Exch. 775; Ludwell v. Newman, 6 T. R. 458. The lessor binds himself to give possession, and not to give the party to whom he demises a mere right to take possession from a wrongdoer by an action of ejectment, Coe v. Clay, 5 Bing. 449; Neale v. Mackenzie, 1 M. & W. 747, and the lessee impliedly binds himself to accept possession and payment. Stanley v. Hayes, 3 Q. B. 105. But a lessee who has contracted orally for the hire of realty, and who neglects or refuses to accept possession of the demised premises, cannot be sued upon such oral agreement for damages for not taking possession, nor upon any oral promise to pay rent reserved by such agreement, nor for use and occupation. But he is liable for rent where he enters into possession, or may be sued for use and occupation, and the price agreed upon will be the measure of recovery. Indeed the liability of a lessee upon his covenants and agreements, express or implied, for the payment of rent, is conditional upon his being put into possession, or being tendered, of-

fered or afforded an opportunity to take possession of the premises. McKeebin v. Whitcroft, 4 H. & McH. (Md.) 135; Lewis v. Payn, 4 Wend. (N. Y.) 423; Lovering v. Lovering, 13 N. H. 518; Maule v. Ashmead, 20 Penn. St. 484. In Dexter v. Manly, 4 Cush. (Mass.) 14, the court held that in a lease for years of real estate comprising a factory, water power, tools, machinery, &c., for carrying on a particular branch of manufacture, there is an implied covenant on the lessor's part that the lessee shall have the free and peaceable enjoyment of the premises during the term so as to enable him to make use of them for purposes for which they were intended, without interruption or disturbance by the lessor. "If," say the court, Holgate v. Kay, 1 C. & K. 841, "you cannot give full possession of the thing demised, you cannot sue in covenant for the rent." Neither can an action for rent be maintained if the tenant has been disturbed in his possession, in the legal sense of the term. Wood v. Partridge, 11 Mass. 488; Bennett v. Bittle, 4 Rawle (Penn.) 339; Bandure v. Fletcher, 11 S. & R. (Penn.) 419; Kessler v. McConahy, 1 Rawle (Penn.) 435. But unless there is an eviction by the

lease, the intended lessor does not impliedly engage for a general warranty, nor undertake to deliver an abstract of his title;¹ nor that he has a good title to the fee simple, and will deliver a written abstract. Except in those States where the statute gives the tenant a right of action to dispossess a trespasser upon the leased premises² there can be no doubt that the landlord impliedly covenants that the premises shall be open for entry by the tenant when the period for the commencement of the term arrives, and if they are at that time so open, his duty is performed, although subsequently a stranger enters into possession. STOWE, J., in an Alabama case³ states the rule very clearly, and as we believe, correctly, thus "The moment the lessor's right of possession ceases by virtue of the lease, that moment the lessee's right of possession begins. There is no appreciable interval between them, and hence there can be no interregnum, or neutral ground between the two attaching rights of possession, for a trespasser to step in and occupy. If there be actual, tortious occupancy, when the transition moment comes, then it is a trespass or wrong done to the lessor's possession. If the trespass or intrusion have its beginning after this, then it is a trespass or wrong done to the lessee's possession; for the right and title to the property being then in the lessee for a term, it draws to it the possession, unless there is another in the actual possession.

We hold that when there is a contract of lease, and no stipulation to the contrary, there is an implied covenant on the part of the lessor, that when the time comes for the lessee to take possession under the lease, according to

landlord himself, liability under the lease continues. *Bandy v. Cartwright*, 8 Exchq. 918; *Line v. Stephenson*, 7 Scott, 68. In *Stanley v. Hayes*, 8 Q. B. 105, it was held that an entry upon the premises by the land tax collector, and a seizure of goods by him to pay a tax due before the lease was made, was not a breach of the covenant for quiet enjoyment. "This distress," said LORD DENMAN, C. J., "was certainly not a proceeding within the terms of the covenant.

We cannot extend the remedy provided by the indenture. 'Let, suit, disturbance or interruption by the defendant or others claiming by, from or under him,' are different things from the injury here complained of, those words implying a claim by title *from* the lessor. Here, the claim was *against* him."

¹ *Gwillim v. Stone*, 3 Taunt. 493.

² *Gardner v. Keteltas*, 3 Hilt. (N. Y.) 880.

³ *King v. Reynolds*, 67 Ala. 239.

the terms of the contract, the premises shall be open to his entry. In other words, that there shall then be no impediment to his taking possession. But this implied covenant or agreement does not extend beyond that time. If after the time when the lessee is entitled to have the possession, according to the terms of the contract, a stranger trespass on, or take possession and hold, this is a wrong done to the lessee, for which the lessor is in no way responsible. And this is the rule, whether the trespass is committed before or after the lessee obtains actual possession. The lessor's covenant extends no farther than to guarantee he had authority to make the lease, and that the premises will be open for occupancy, when the contract gives to the lessee the right to enter.

The lease in this case was made to take effect as soon as the lessee complied with his part of the contract, by paying and securing the rent. When he did that, he was entitled to the possession. Was a trespasser then in possession of the premises, so as to forbid his taking possession? If so, King's implied covenant of quiet enjoyment was broken. The bill of exceptions informs us that the testimony on this point was in conflict. It became necessary then to submit this question to the jury. The defendant, appellant here, requested the following written charge: "When the defendant leased the land to the plaintiff, the contract of leasing transferred to the plaintiff all the possession the defendant had; and if a trespasser afterward went into possession, his acts were a trespass against the lessee, and not against the landlord." This charge was refused, and defendant excepted. This charge was based on one phase of the testimony, namely: that portion which tended to show that the trespasser, or third party, was not in possession, until after Reynolds' right to take possession under the lease, had accrued. If the possession was open when the contract was completed, on the part of Reynolds, then the trespass afterward gave him no right of action against King. His sole recourse would be against the trespasser. The charge requested ought to have been given."

SEC. 356. **Cessor of implied covenant.**—A covenant in law, *i. e.*, an implied covenant, ceases with the estate of the lessor, and does not necessarily continue during the whole term expressed to be granted. Therefore, if a tenant for life demise by indenture for fifteen years, without any express covenant for quiet enjoyment, upon his death during the term the covenant in law implied from the word “demise” will cease.¹ But an express covenant or one to be implied by construction of words used in the deed by way of warranty or contract, would continue in force to the end of the term expressed to be granted, and not merely during the actual continuance of such term.² A covenant in law shall go to the assignee of the term, and he shall give advantage of it during the actual continuance of the term, but the executors or administrators of the lessor are not liable where the term ceases on his death and the lessee is subsequently evicted. Where tenant for life, with remainder over, demised by indenture for years, without any express covenant for quiet enjoyment, and the lessee was evicted by the remainder-man after the death of the tenant for life, but before the expiration of the term; it was held, that he could not maintain an action of covenant against the executor of the tenant for life.³ If the incumbent of a living let lands belonging to the benefice for a term of years, his resignation of the living during the term is a breach of the contract.⁴ Where an agreement for letting part of a house at a rent of 30*l.* contained a clause that the tenant should be liable only to the said rent, such clause was held to be a clause of indemnity, and that an action would lie upon it where the tenant's goods were seized under a distress for rent by the original landlord, though the party giving the indemnity was not the immediate tenant of such original landlord; it was also held, that if no notice be given to the party indemnifying, and he pay the rent, and protect his tenant's goods, such tenant cannot recover specially on a

¹ Temple v. Brown, 6 Taunt. 60.

² Evans v. Vaughn, 4 B. & C. 261; Williams v. Burrell, 1 C. B. 402; Locke v. Furze, 19 C. B. N. S. 96.

³ Adams v. Gibney, 6 Bing. 656; Woodhouse v. Jenkins, 9 Bing. 481.

⁴ Price v. Williams, 1 M. & W. 6.

count framed on the indemnity, though he may recover the money on the common counts.¹ In these cases of implied contract of indemnity against the consequences of distress, an action of tort is the proper form of remedy.²

SEC. 357. *Form of usual qualified covenant for quiet enjoyment.*—The usual *qualified* covenant for quiet enjoyment is to the following effect, viz.: “And the said [lessor] doth hereby for himself, his heirs, executors, and administrators, covenant with the said [lessee], his executors, administrators and assigns, that he and they paying the rent hereby reserved, and performing the covenants hereinbefore on his and their part contained, shall and may peacefully possess and enjoy the said demised premises for the term hereby granted, without any interruption or disturbance from or by the said [lessor], his heirs, executors, administrators or assigns, *or any other person or persons claiming by, from, or under him, them or any of them.*” Such a covenant may be safely entered into by any lessor who never had any title whatever to the demised premises, or any part thereof; because any subsequent entry, eviction, ejectment or other interruption or disturbance by the real owner, or by the party entitled to possession, or by any other person who does not claim “by, from or under” the lessor, would be no breach of such qualified covenants.³ The wrongful acts of a tenant of the lessor, under a previous lease, who does things not authorized by such lease, do not amount to a breach of the usual qualified covenant for quiet enjoyment.⁴ So, in conveyances containing the usual qualified covenants for title, &c.,⁵ a distress for previous arrears of land tax due from the lessor would be no breach of such covenant, because the collector does not claim by, from, or under, but *against* the lessor.⁶

SEC. 358. *Unqualified covenant for quiet enjoyment.*—A lessee is a purchaser *pro tanto* to whom the maxim

¹ Evans v. Curtis, 2 C. & P. 296.

² Hancock v. Coffyn, 8 Bing. 358.

³ Merrill v. Frame, 4 Taunt. 329; Smith, L. & T. 290 (2d ed.); 2 Platt on Leases, 285.

⁴ Jeffryes v. Evans, 19 C. B. N. S. 246.

⁵ Thackeray v. Wood, 5 B. & S. 325.

⁶ Stanley v. Hayes, 3 Q. B. 105.

caveat emptor applies.' Therefore he must, at his peril, ascertain that the intended lessor has sufficient title to demise for the proposed term,¹ and that his conveyance does not restrict him from permitting the premises to be used for any trade or business intended,² or the lessee should obtain from the lessor an *unqualified* covenant for quiet enjoyment during the term, without any interruption or disturbance by the lessor, "or by any other person or persons whomsoever;" i. e., against all persons having lawful title: or he must take his chance and run all risk as to the lessor's title. Such risk may sometimes be incurred without much danger where the premises are demised for a short term. But where the lessee is to build upon or otherwise improve the demised premises, or pays a premium for the lease, he should take care either to investigate the lessor's title or obtain an *unqualified* covenant for quiet enjoyment during the term.³ Such covenant does not extend to unlawful acts of third persons having no title.⁴ The lessor ought not to refuse to enter into such a covenant where no investigation of his title takes place. It is much more reasonable that he, rather than the tenant, should run any risk as to his own title when he does not allow it to be investigated by or on behalf of the tenant. But it frequently happens that an intended lessee fears to give offence and to lose the proposed lease by asking either for an investigation of the lessor's title or for an unqualified covenant for quiet enjoyment. It should however, be remembered, that a lessee cannot at any time sell his lease, either by auction or by private contract, without producing and proving his lessor's title, unless there be some condition of sale or other express stipulation to the contrary. An underlessee, who neglects to inquire into the provisions of the original lease, does so at his own risk, and may,

¹ Sugd. V. & P. Chap. x. s. 1., pl. 12.

² Spencer v. Marriott, 1 B. & C. 457.

³ Parker v. Whyte, 1 H. & M. 167; Jay v. Richardson, 30 Beav. 568; Clements v. Welles, L. R., 1 Eq. 200; Mitchell v. Steward, L.

R., 1 Eq. 541; Wilson v. Hart, 11 Jur. N. S. 735.

⁴ Onions v. Cohen, 2 H. & M. 534.

⁵ Stanley v. Hayes, 3 Q. B. 105; Line v. Stephenson, 7 Scott, 68; Bandy v. Cartwright, 8 Exchq. 913.

at the instance of the original lessor, be restrained by injunction from breaking the covenants in such lease, although they are not repeated in the underlease ;¹ or he may be ejected for a forfeiture, and perhaps have no remedy over against his immediate lessor.²

SEC. 359. Any express covenant excludes an implied one.—The usual *qualified* covenant for quiet enjoyment is frequently inserted more for the protection of the lessor than of the lessee, and to prevent a more general and unqualified covenant being implied by law from the word “demise,”³ or any equivalent word, such as “let” or “lease.”⁴ So, in conveyances the usual qualified covenants for title, &c., are introduced “for the purpose of qualifying the general warranty with the old common law covenant implied.”⁵ An implied covenant for quiet enjoyment extends to all *lawful* interruptions and disturbances *by any person or persons whomsoever* during the continuance of the term ; but not to unlawful interruptions and disturbances by strangers, against whom the law provides a remedy by action *f* trespass, &c. An express qualified covenant continues during the whole term expressed to be granted, but is confined to interruptions and disturbances by the lessor, or by persons lawfully claiming by, from, or under him : or otherwise, as expressed in the covenant.⁶

SEC. 360. Decisions on express covenants for quiet enjoyment.—A covenant for quiet enjoyment by the lessee, his executors, administrators and assigns, during the term, *he or they paying the rent thereby reserved and performing the covenants* on his and their part therein contained,

¹ Parker v. Whyte, 1 H. & M. 167 ; Jay v. Richardson, 30 Beav. 563 ; Herbert v. Mclean, 12 Ir. Ch. R. 84 ; Clements v. Welles, L. R., 1 Eq. 200 ; Robson v. Flight, 34 L. J. Ch. 101 ; Mitchell v. Steward, L. R., 1 Eq. 541 ; Wilson v. Hart, 11 Jur. N. S. 735.

² Spencer v. Marriott, 1 B. & C. 457 ; Hayward v. Parke, 16 C. B. 295, 327.

³ Hayes v. Bickerstaff, Vaugh. 126 ; 2 Platt on Leases, 285 ; Smith L. & T. 280 (2d ed.).

⁴ Hall v. City of London Brewery Co. (Limited), 2 B. & S. 737.

⁵ Per Buller, J., in Browning v. Wright, 2 B. & P. 13 ; cited 5 B. & S. 340.

⁶ Spencer v. Marriott, 1 B. & C. 457 ; Lock v. Furze, 19 C. B. N. S. 96.

is not a covenant subject to a condition precedent.¹ The words "during the said term" mean during the whole term expressed to be granted, and not merely during the actual continuance of the term. But it is otherwise where the covenant is implied by law. A tenant for life, with a power of leasing, made a lease for years, in which was a clause that "he, for himself, his heirs and assigns, the said demised premises unto the said lessee, his executors, administrators and assigns, under the rent, covenants, conditions, exceptions and agreements before expressed, against all persons whatsoever lawfully claiming the same, shall and will during the said term warrant and defend:" held, that this amounted to an express covenant for quiet enjoyment during the whole term expressed to be granted.² A general covenant for quiet enjoyment without any interruption or disturbance by the lessor, his heirs or assigns, "or by any other person or persons whomsoever," does not extend to the *unlawful acts of third persons having no title*.³ The law will never adjudge that a lessor covenants against the *wrongful acts of strangers*, except his covenant is express to that purpose; for the law itself does defend every man against wrong; and therefore, though one warrants land to another expressly, or covenants for quiet enjoyment *generally*, yet he does not defend against tortious entries.⁴ "Where a man covenants to indemnify against all persons, this is but a covenant to indemnify against a lawful title. And the reason is, because, as it regards such acts as may arise from rightful claims, a man may well be supposed to covenant against all the world; but it would be an extravagant extension of such a covenant, if it were good against all the acts which the folly or malice of strangers might suggest; and therefore the law has

¹ Dawson v. Dyer, Bart., 5 B. & Ad. 584; Hays v. Bickerstaff, 2 Mod. 34; Allen v. Babbington, Sid. 280; Ludwell v. Newman, 6 T. R. 458.

² Williams v. Burrell, 1 C. B. 402; Wotton v. Hele, 2 Wms. Saund. 177; Lock v. Furze, 19 C. B. N. S. 96.

³ Year Bk. 22 Hen. 6, 52 b; 32 Hen. 6, 32 b; Tisdale v. Sir W. Essex, Hob. 34, 35; Hayes v. Bickerstaff, Vaugh. 118; Dudley v. Folliott, 3 T. R. 585; Foster v. Pierson, 4 T. R. 617; Young v. Raincock, 7 C. B. 310.

⁴ Wms. Saund. 178 a, n. (3).

properly restrained it within its reasonable import ; that is, to rightful title. It is, however, different where an individual is named, for there the covenantor is presumed to know the person against whose acts he is content to covenant, and may therefore be reasonably expected to stipulate against any disturbance from him, whether by lawful title or otherwise.”¹ Therefore a covenant for quiet enjoyment, or for indemnity against all actions, suits, claims and demands whatsoever, both in law and equity, of certain *named persons*, extends to their unlawful acts, claims and demands, without any lawful right or title,² as well as to their lawful acts.³ The covenant applies to all interruptions and disturbances by the lessor himself, he being a party named.⁴ Therefore, if a lessor covenants that he will not interrupt the lessee in the enjoyment of a close demised, the erection by him of a gate on a necessary way leading to it, so as to intercept it, is a breach of the covenant, although the lessor had a legal right to erect the gate there, but for his covenant.⁵ So if the lessor of a mine excavates a stone quarry over it, in such a manner as thereby to interrupt the lessee in his occupation of the mine, that is a breach of the covenant for quiet enjoyment, whether the lessor has or has not a legal right to excavate the quarry.⁶ If the lessor covenants with the lessee that he has not done any acts to prejudice the lease, but that the lessee shall enjoy it against all persons ; in this case, the words “against all persons” refers to the first branch of the covenant, and are limited and restrained to acts done by him.⁷ Where the lessors covenanted that the lessee of a mill should enjoy the mill and stream without interruption by them, or by persons claiming under them, or by their acts or procurement, a diminution of the water occasioned by supplies under contracts entered into by the lessors prior to making the lease, is not a breach of the covenant for quiet enjoy-

¹ Nash v. Palmer, 5 M. & S. 374, 379; Foster v. Mapes, Cro. Eliz. 213.

² Fowle v. Welsh, 1 B. & C. 29.

³ Foster v. Mapes, ante; Perry v. Edwards, 1 Stra. 400.

⁴ Andrews v. Paradise, 8 Mod. 318.

⁵ Corus v—, Cro. Eliz. 544; Lloyd v. Tomkies, 1 T. R. 671.

⁶ Shaw v. Stenton, 2 H. & N. 858.

⁷ Shep. Touch. 166.

ment.¹ But where the covenants for title are general and absolute against all persons they will not be qualified by reference to other covenants, unless there are words, either in the absolute covenants themselves, or in the preceding or subsequent ones, to connect them.* Where A B covenanted with his lessee for quiet enjoyment as against any person "claiming by, from or under" him, it was held, that an eviction by a prior appointee of A B and C D was a breach of the covenant, and that the case was not altered by the grant to the lessee being "as far as in his power lay, or he lawfully might or could."² So an eviction by the lessor's widow, claiming under a settlement executed by him before the lease, constitutes a breach.* The usual qualified covenant for quiet enjoyment is broken by an eviction, molestation or disturbance of the lessee by persons claiming under a prior mortgage for a long term granted by the trustees of a settlement *with the concurrence of the defendant*, who joined therein and covenanted for payment of the mortgage money, and for title, &c.* In an action against executors in their own right, on a covenant for "good title and quiet enjoyment against any person or persons whatsoever," contained in an assignment of a lease of the testator by way of mortgage, it was held, that the cause of action must arise from some act of the covenantors.* Covenant is an underlease by A to B that B should hold the premises without any lawful let, suit, interruption or eviction by A, or by or through his acts, *means*, right, title, forfeiture, &c. A held under a lease for a longer term, which contained a clause of re-entry by the original lessor in case the premises should be used for a shop. The underlease contained no such clause, nor was B informed of it. He underlet to C, who incurred a forfeiture by using the premises for a shop, and the original lessor thereupon evicted him :

¹ Blatchford v. Mayor, &c., of Plymouth, 3 Bing. N. C. 691; and see Thackeray v. Wood, 5 B. & S. 325.

² Smith v. Compton, 3 B. & Ad. 189.

³ Calvert v. Sebright, 15 Beav.

156; and see Lock v. Furze, 19 C. B. N. S. 96.

⁴ Butler v. Swinnerton, Cro. Jac. 656; Palm. 339; 2 Roll. 286.

⁵ Carpenter v. Parker, 3 C. B. N. S. 206.

⁶ Noble v. Smith, 1 H. Blac. 34.

held, that this was not an eviction *by means of* A within the meaning of the covenant in the underlease.' In a demise for 500 years the lessor covenanted that he had not done, nor permitted or suffered to be done, any act whereby the property was encumbered: held, that his having assented to an act which he could not prevent was not a breach of the covenant.' A covenant that the lessee shall quietly enjoy against all claiming or *pretending to claim*, a right in the premises, extends to all interruptions, be the claim legal or not, provided it appear that the disturber do not claim under the lessee himself.'

SEC. 361. *What is a breach of.*—A breach of the covenant for quiet enjoyment may occur either by a molestation arising from a suit at law or in equity relating to the title or possession, or by any act by which the lessee is disturbed in the possession of the premises. Of the first kind is a recovery by ejectment by a person having a lawful title; or any other suit by which the peaceable occupation of the premises is prevented: thus, a covenant in a lease, that the lessee should quietly enjoy the estate discharged from tithes, is broken by a suit for them, although commenced after the expiration of the term: 'but where in covenant for quiet enjoyment the breach assigned was, "that the defendant had exhibited a bill in chancery against him for plowing meadow, and obtained an injunction, which had been dissolved with costs;" it was held on demurrer to be no breach of covenant, for the covenant was for quiet enjoyment, and this was a suit for waste.' But a suit in equity that involves the title and estate operates as a breach; 'so does a

¹ *Spencer v. Marriott*, 1 B. & C. 457.

² *Hobson v. Middleton*, 6 B. & C. 295; and see *Thackeray v. Wood*, 5 B. & S. 325.

³ *Chaplin v. Southgate*, 10 Mod. 384; 1 Comyn, 230; and see *Ibbett v. De la Salle*, 6 H. & N. 233.

⁴ *Laming v. Laming*, Cro. Eliz. 216.

⁵ *Morgan v. Hunt*, 2 Vent. 215.

⁶ *Coulston v. Carr*, Cro. Eliz. 347; *Lanning v. Lovering*, id.

916; *Morgan v. Hunt*, 2 Vent. 218; *Daerdemay v. Oland*, Cro. Eliz. 768; *Ashton v. Martyn*, 2 Keb. 268. The covenant goes to the possession, and not to the title, and is not broken by a failure of the lessor's title merely, *Parker v. Dunn*, 2 Jones (N. C.) L. 208; *Waldron v. McCarty*, 8 John. (N. Y.) 471; *Howard v. Doolittle*, 8 Duer (N. Y. Superior Ct.) 464; *Whitbeck v. Cook*, 11 John. (N. Y.) 438; *Boothby v. Hathaway*,

recovery in ejectment,¹ or in trespass where the title is involved.² But the language of the covenant must be looked to, and it may be such that a mere judgment in an action involving the title will not operate as a breach. Thus, if the covenant is that "the lessee shall enjoy the premises without lawful eviction,"³ it has been held that a bill in equity involving the title, brought against the lessor alone, does not operate as a breach.⁴ The covenant may be either general or qualified, but in either case it runs with the land.⁵ Even though the language of the covenants is that, "subject to the payment of the rent and the performance of the covenants," the lessee shall quietly enjoy, yet such words do not constitute a condition precedent, and a recovery may be had by the lessee for a breach of the covenant, although he has not paid the rent or performed his covenants.⁶ Any description

20 Me. 251; Webb v. Alexander, 7 Wend. (N. Y.) 281; Kortz v. Carpenter, 5 John. (N. Y.) 120; Van Slyck v. Kimball, 8 id. 198; Grist v. Hodges, Dev. 3 (N. C.) L. 200; Cable v. Wellborn, 2 id. 888, and it has been held that a mere recovery in ejectment does not have that effect, Kerr v. Shaw, 13 John. (N. Y.) 236, or in trespass as a person claiming title to the land. Webb v. Alexander, ante. But the better rule would seem to be that a recovery against the lessor in any action either at law or in equity involving his title or estate, and affecting his immediate right of possession, operates as a breach of the ordinary covenant for quiet enjoyment. Martin v. Martin, 1 Dev. (N. C.) L. 43; 2 Platt on Leases, 289, and cases cited. But in order to constitute a breach there must be a union of acts of disturbance and title, and a disturbance by a mere intruder does not create a breach, Hoppes v. Cheek, 21 Ark. 585; Runtin v. Robertson, 2 Strobh. (S. C.) 866, and the eviction and disturbance must be under rights or a title existing at the time when the lease was made, and not under rights subsequently acquired. Ellis v. Welch, 6 Mass. 246. The rule is as expressed in Knapp v. Marlboro, 34 Vt. 235, that, to sustain

an action for the breach of a covenant for quiet enjoyment, it is necessary for the plaintiff to prove that he was evicted by a person who had a lawful and paramount title, *existing before, or at the time when the covenant was entered into*, as the covenant relates only to the acts of those claiming title and to rights existing at the time it was entered into. See also, Grist v. Hodges, 3 Dev. (N. C.) L. 200. A mere demand of possession by a person having title does not operate as a breach of this covenant, Cowan v. Silliman, 4 id. 46, nor does an eviction from a part of the premises under a statute, or municipal authority. Frost v. Earnest, 4 Whart. (Penn.) 86.

¹ Cobb v. Wellborn, 2 Dev. (N. C.) L. 388; Mitchell v. Warner, 5 Conn. 522. But *contra*, and holding that it does not constitute a breach, see Kerr v. Shaw, 13 John. (N. Y.) 236.

² Cobb v. Wellborn, ante. But *contra*, see Webb v. Alexander, 7 Wend. (N. Y.) 281.

³ Anonymous, 3 Leon. 71, pl. 109.

⁴ See also, Selby v. Chute, 1 Rol. Ab. 430, pl. 15.

⁵ Campbell v. Lewis, 8 Taunt. 715; Noke v. Awder, Cro. Eliz. 373.

⁶ Dawson v. Dyer, 5 B. & Ad. 584; Allen v. Babbington, 1 Sid.

of annoyance to the occupation of the premises, which prevents the lessee from enjoying his property in so ample a manner as he is entitled to do by the terms of the lease, amounts to a breach of the covenant for quiet enjoyment of the second sort: thus, if a man covenants that he will not interrupt the covenantee in the enjoyment of premises, the erection of a gate which intercepts them is a breach of the covenant, although he had a right to erect it.¹ So if, after a demise of mines containing the usual covenant for quiet enjoyment, the lessor digs a quarry over the mines and makes holes, through which water percolates and escapes into the mines, although he had a legal right to work the quarry, his doing so in such a manner amounts to a breach of the covenant for quiet enjoyment of the mines.² An action on the covenant for quiet enjoyment may be maintained for the disturbance of a way of necessity;³ or of a way by grant from the covenantor.⁴ It must be remembered, however, that the act done must be in the assertion of title, and not a mere tortious act for which an action of trespass might be maintained.⁵ A covenant for quiet enjoyment does not oblige the lessor to rebuild or repair, in case the buildings are destroyed or injured by fire, tempest or otherwise.⁶ The covenant extends only to *lawful* interrup-

280; *Hayes v. Bickerstaff*, 2 Mod. 34; *Anonymous*, 2 Show. 202; *Wakeman v. Waker*, 1 Vent. 294.

¹ *Andrews v. Paradise*, 8 Mod. 318; A mere demand of rent by a person having a superior title does not amount to a breach, nor does any act of the lessor that merely amounts to a trespass. There must be either an actual or constructive eviction. *Cowan v. Silliman*, 4 Dev. (N. C.) L. 46; *Mayor v. Mabie*, 13 N. Y. 151; *Valet v. Herner*, 1 Hilt. (N. Y. C. P.) 149; *Lounsbury v. Snyder*, 31 N. Y. 514, nor does an *unlawful* act of another disturbing the tenant's possession amount to a breach. There must be a rightful interruption by a paramount title. *Rootin v. Robertson*, 2 Strobh. (S. C.) 366, but there may be an eviction and a consequent breach without a judgment. *Cobb v. Well-*

born, 2 Dev. (N. C.) L. 388; *Stewart v. Drake*, 9 N. J. L. 139; *McGarry v. Hastings*, 39 Cal. 360; *Grist v. Hodges*, 8 Dev. (N. C.) L. 200. Such a covenant may be said to be broken *whenever there has been an involuntary loss of possession by the hostile assertion of an irresistible title, whether with or without judgment, or whether an actual dispossession has transpired or not. It is enough if the title is paramount, and is asserted so that the tenant must either quit possession or yield to it.* *McGarry v. Hastings*, 39 Cal. 360.

² *Shaw v. Stenton*, 2 H. & N. 858.

³ *Morris v. Edgington*, 3 Taunt. 24.

⁴ *Pomfret v. Ricroft*, 1 Saund. 822.

⁵ *Sedden v. Senate*, 18 East, 72.

⁶ *Brown v. Quilter, Ambler*, 620.

tions, whether the word *lawful* is used ~~in the~~ covenant or not.¹

But a disturbance of the lessee by the lessor himself is not regarded with the same lenity as an eviction by a stranger; it being clear, that the lessor exposes himself to an action on his covenant, although he enters wrongfully, notwithstanding the covenant provides against *lawful* evictions only;² for, in such a case, the court will not consider the word *lawful*; nor drive the plaintiff to his action of trespass, when by the general implied covenant in law the lessor has engaged not to avoid his own deed, either by a rightful or tortious entry.³ Indeed, it would hardly be consistent with reason to allow the lessor to defeat the tenancy by pleading his own wrong.

So, if a lessor covenants for quiet enjoyment against himself and his executors, the lessee, on eviction by the executor, need not show that the executor entered by title, any more than in the case of the lessor himself.⁴

To support an action against the lessor, it is not necessary that he should *have* a title to enter; it is sufficient if he enters under a *claim* of one.⁵ And in the case just cited, where a vendor prevented a purchaser from enjoying a new appurtenant to the house sold, by locking it up against the purchaser's will, the court held that this

¹ Foster v. Pierson, 4 T. R. 617; Dudley v. Falliott, 3 id. 584; Major v. Grigg, 2 Mod. 218, and an allegation of a breach that does not show an interruption by title is bad; Rantin v. Robertson, 2 Strobb. (S. C.) 866; Mayor v. Mabbie, 13 N. Y. 151; Perry v. Edwards, 1 Strange, 400; Nicholas v. Pullin, 1 Lev. 83; Holmes v. Seller, 3 id. 305; Bailey v. Hughes, W. Jo. 242; Hamond v. Dod, Cro. Car. 5; Anonymous, Loftt. 460; Chaundflower v. Priestley, Yelv. 80; and it makes no difference whether the word "*lawful*" is used in the covenant or not. General covenants for quiet enjoyment are not broken by a *tortious* eviction, but by an eviction *by title* only, Hayes v. Bickerstaff, Vaughn, 118; Hunt v. Allen, Winch, 25; Tisdale v. Essex, Hob. 85, and in an action for a breach of such a covenant, the

plaintiff's declaration must set up an eviction by title paramount. Walton v. Hele, 2 Saund. 177; Lanning v. Lovering, Cro. Eliz. 916; Nokes' Case, 4 Coke, 80 b; Bloxam v. Walker, Freem. 124; Foster v. Mapes, Cro. Eliz. 212; Brocking v. Cham. Cro. Jac. 425; Hamond v. Dod, Cro. Car. 5; Cowper v. Pollard, W. Jo. 197.

² Corus v. —, Cro. Eliz. 544; Andrew's Case, Cro. Eliz. 214; Penning v. Plat, Cro. Jac. 383; Pemberton v. Platt, 1 Rol. 267; Cave v. Brookesby, W. Jo. 360; Crosse v. Young, 2 Show. 425; Lloyd v. Tomkies, 1 T. R. 671. And see Seaman v. Browning, 1 Leon, 157.

³ Crosse v. Young, ante; Lloyd v. Tomkies, ante.

⁴ Forte v. Vine, 2 Rol. 21; Ratcliff v. —, 1 Bl. & Gold, 80.

⁵ Lloyd v. Tomkies, 1 T. R. 671.

was such an assertion of right as to render the lessor liable to an action.¹

An accidental trespass on the premises in hunting,² or an entry for the purpose of beating the lessee, would not have that effect.³ If the lessor covenants for quiet enjoyment against the acts of a person *particularly specified*, a disturbance by that person will amount to a breach, whether it is a rightful or tortious disturbance.⁴ So, where one covenanted for quiet enjoyment without interruption by any person "having or claiming, or pretending to have or claim," any right of common; and a breach was assigned, alleging an interruption by one J B, who claimed common, &c. ; it was held, that the plaintiff need not show any title in J B; for the covenant expressly extended not only to those who had right, but to those who claimed or pretended to a right; and, therefore, whether the claim were rightful or groundless, the covenantor was liable.⁵

If a general covenant for quiet enjoyment contains an exception of particular persons, the exception will be construed strictly, so as not to include any others than those expressly named.⁶ A covenant for the quiet enjoyment of certain premises demised, excepting from the demise to one E K a certain close, parcel thereof, does not amount to a covenant for quiet enjoyment against an interruption by E K as to the lands actually comprised in the lease.⁷

In assigning a breach of a covenant for quiet enjoyment, where the interruption is the act of a third party, against whom the covenant has not specifically provided, it is not sufficient to allege that having lawful right and title he entered, without alleging also *that he had such lawful title before or at the time of the date of the lease to the plaintiff*, for possibly he might have derived title

¹ Lloyd v. Tomkies, 1 T. R. 671.

² Seddon v. Senate, 13 East, 72.

³ Penn v. Glover, Cro. Eliz. 421.

⁴ Foster v. Mapes, Cro. Eliz. 212; Tisdale v. Essex, Hob. 85; Hill v. Browne, Freem. 142; Perry v. Edwards, 1 Stra. 400; Nash v. Palmer, 5 M. & S. 374; Fowle v. Welsh, 1 B. & C. 29. But see

Hayes v. Bickerstaff, Vaugh. 118.

⁵ Southgate v. Chaplin, 10 Mod.

383; Perry v. Edwards, Stra. 400.

⁶ Woodrosse v. Greenwood, Cro. Eliz. 517.

⁷ Woodrosse v. Greenwood, Cro. Eliz. 517; Rashleigh v. Williams, 2 Vent. 61.

from the plaintiff himself.¹ It is not necessary, however, for the declaration to show what title he had. A different rule would impose insuperable difficulties on the plaintiff, a knowledge of the title being only to be acquired by inspection of the deeds, to which he could not have access.² But where the interruption is by the lessor himself,³ or by a person against whose acts the covenant has specially provided, it is sufficient to allege an entry by him, without stating under what title or pretence, or whether by right or wrong.⁴ Some particular act, however, by which the plaintiff is interrupted must be shown, otherwise the breach will not be well assigned.⁵ In an action on a covenant that the lessor is seized in fee, a breach may be assigned in terms as general as the covenant, viz., that he was not seized in fee, without showing that another was so seized, nor why the defendant was not so seized.⁶ So, on a covenant that the lessor has good right to demise, the lessee may assign as a breach that he had not good right, without showing in whom the right was vested.⁷

In an action on a covenant for quiet enjoyment, an allegation, as a breach, that the plaintiff (lessee) entered and was evicted by the defendant (lessor), is not supported by proof that he made a demand of possession and was refused, an expulsion, which is a putting out, not having taken place; for a party who comes to claim, but has never entered, cannot be expelled. The breach is not for expelling, but for not letting in.⁸ The ordi-

¹ Kirby v. Hanksaker, Cro. Jac. 815; Wooten v. Hele, 2 Saund. 177; Proctor v. Newton, 1 Vent. 184; Norman v. Foster, 1 Mod. 101; Forte v. Vine, 2 Rol. 21; Skinner v. Kilbys, 1 Show. 70; Anon., 2 Vent. 46; Rashleigh v. Williams, 2 Vent. 61; Buckley v. Williams, 3 Lev. 325; Jordan v. Twells, Ca. temp. Hardw. 171; Foster v. Pierson, 4 T. R. 617; Hodgson v. The East India Company, 8 T. R. 278; Campbell v. Lewis, 3 B. & Ald. 392. And see Noble v. King, 1 H. Bl. 34; Brookes v. Humphreys, 5 Bing. N. C. 55; Fraser v. Skey, 3 Chit. 646.

² Proctor v. Newton, ante; Foster v. Pierson, ante; Hodgson v. The East India Company, ante.

³ Corus v. —, Cro. Eliz. 544.

⁴ Foster v. Mapes, ante.

⁵ Anon., Com. 228.

⁶ Muscot v. Ballet, Cro. Jac. 369; Glinister v. Audley, T. Raym. 14; Glimston v. Audly, 1 Keb. 58.

⁷ Bradshaw's Case, 9 Coke, 60 b; Salman v. Bradshaw, Cro. Jac. 304; Lancashire v. Glover, 2 Show. 460.

⁸ Hawkes v. Orton, 5 Ad. & El. 367; Warn v. Bickford, 9 Pri. 43.

nary covenant, by the lessor, for quiet enjoyment *as against any person claiming by, from or under him*, is broken by an eviction of the tenant by the lessor's widow entitled under a conveyance taken by the lessor to the use of himself and his wife;¹ also by an eviction by a person claiming under a prior appointment by the covenantor and another person;² but a distress for arrears of land tax due from the lessor at the time of the demise will not operate as a breach.³ The lessee of a house and garden, forming part of a large area of building ground, is not entitled under this covenant to restrain the lessor or persons claiming under him from building on the adjoining land so as to obstruct the free access of light and air to the garden.⁴ When contained in a lease of the exclusive right of shooting and sporting over a farm, this covenant does not hinder the tenant of the farm from using the land in the ordinary way, or from destroying furze and underwood in the reasonable use of the land as a farm; and the lessor will not be liable for wrongful acts committed by such tenant contrary to the reservation of his landlord.⁵ Under a covenant in the form above mentioned contained in a lease of a stream of water, excepting so much as should be sufficient for the supply of persons with whom the lessor should have already contracted, diversions occasioned by contracts made previously to the demise will not constitute breaches.⁶ Where the covenant provides that the lessee shall quietly hold and enjoy the premises *for and during the said term*, the last words must be taken to refer to the term which the lessor assumed to grant by the lease, and not to the term which he actually had power to grant.⁷

A *general covenant for quiet enjoyment* extends only to the acts of persons claiming under a lawful title;⁸ for

¹ Butler v. Swinnerton, Cro. Jac. 657.

² Calvert v. Sebright, 15 Beav. 156. As to what constitutes an eviction, see Chapter on *Eviction*, *post*.

³ Stanley v. Hayes, 3 Q. B. 105.

⁴ Potts v. Smith, L. R., 6 Eq. 311.

⁵ Jeffryes v. Evans, 19 C. B. N. S. 246. See Newton v. Wilmot, 8 M. & W. 711.

⁶ Blatchford v. Plymouth, 3 Bing. N. C. 691.

⁷ Evans v. Vaughan, 4 B. & C. 261, 268.

⁸ Dudley v. Folliott, 3 T. R. 584.

the law will never adjudge that a lessor covenants against the wrongful acts of strangers, except his covenant is express to that purpose.¹ The construction, however, is different where an individual is named; for there the covenantor is presumed to know the person against whose acts he is content to covenant, and may therefore be reasonably expected to stipulate against any disturbance from him, whether by lawful title or otherwise.²

Under a general covenant for quiet enjoyment contained in the lease of a coal mine, the working of ironstone lying between the surface and the demised coal in such a manner as to interrupt the lessee in his occupation of the mine, will constitute a breach.³

Under a covenant *by the lessor, in an underlease, that the lessee shall hold the premises without any lawful eviction, &c., by the lessor, or any persons whomsoever claiming by, from, under or in trust for her, or by or through her acts, means, right, &c.,* an eviction of the underlessee by the original lessor for a forfeiture incurred by the use of the premises as a shop, contrary to a covenant in the original lease, of which the underlessee had not been informed, is not an eviction by *means* of the lessor within the meaning of the covenant.⁴ Under a covenant *that the tenant, paying the rent and performing the covenants, shall quietly enjoy,* the payment of rent is not a condition precedent to the performance of the covenant for quiet enjoyment.⁵ A clause *in a deed, whereby the lessor "for himself, his heirs and assigns, the premises unto the lessee, his executors, administrators and assigns, under the rents, covenants, &c., before expressed, against all persons whatsoever lawfully claiming the same, shall and*

¹ Wotton v. Hele, 2 Wms. Saund. 178, note (8).

² LD. ELLENBOROUGH, C. J., in Nash v. Palmer, 5 M. & S. 380; Fowle v. Welsh, 1 B. & C. 29.

³ Shaw v. Stenton, 2 H. & N. 858.

⁴ Spencer v. Marriott, 1 B. & C. 457. See Woodhouse v. Jenkins, 9 Bing. 431. The landlord is absolved from a covenant to deliver

possession of premises on a certain day, if, on that day he is ready to give possession, and the fact that the tenant is prevented from obtaining possession the next day because of the entry of a trespasser, does not render the landlord liable on the covenant. Hertzberg v. Brisenberg, 64 Tex. 262.

⁵ Dawson v. Dyer, 5 B. & Ad. 584.

will, during the term, warrant and defend," operates as an express covenant for quiet enjoyment during the whole term granted by the lease.¹

SEC. 362. *Damages for breach of covenant.*—Upon the breach of a covenant for quiet enjoyment in a lease, which turns out to be void, and under which the lessee has entered, the lessee is entitled to recover the value of the term and the costs of defending an action of ejectment, and also the sum recovered as mesne profits by the plaintiff in such action. The same rule applies where the lessee has not actually entered, but has only an *interesse termini*;² and where he has accepted a new lease of the premises from the person entitled to them, the difference in value between the two leases may be used as a list of the amount of damages to which he is entitled.³ The rule was formerly to give nominal damages, and such mesne profits as the tenant has been compelled to pay, with costs,⁴ and nothing for the market value of the term.⁵ But a more just and liberal rule is now adopted, and, especially where the lessor has been guilty of fraud, or negligence in omitting to prevent an ouster when he had the power to do so, it is held that the tenant may recover the difference between the rent he was to pay, and the actual value of the unexpired term,⁶ as well as

¹ Williams v. Burrell, 1 C. B. 402.

² Williams v. Burrell, ante.

³ Lock v. Furze, L. R., 1 C. P. 441.

⁴ Baldwin v. Munn, 2 Wend. (N. Y.) 99; Flureau v. Thornhill, 2 W. Bl. 1078; Conger v. Weaver, 20 N. Y. 140; Trull v. Granger, 8 N. Y. 115.

⁵ Burnett v. Fromberger, 4 Dall. (Penn.) 441.

⁶ Dyer v. Wightman, 66 Penn. St. 455; Rickett v. Losteller, 19 Ind. 125; Wilson v. Raybould, 56 Ill. 417; Shaw v. Hoffman, Chatterton v. Fox, 5 Duer (N. Y.) 64; Snodgrass v. Reynolds, 79 Ala. 452, 58 Am. Rep. 601. See upon this question Trull v. Granger, 8 N. Y. 115; Doherty v. Dalan, 68 Me. 87; Walker v. Moore, 10 B. & C. 416; Newborough v. Walker, 8 Gratt. (Va.) 16; Dexter v. Manley, 4 Cush.

(Mass.) 14; Dobbins v. Duguid, 68 Ill. 464; Adair v. Bogle, 20 Iowa, 138; Rose v. Wynn, 42 Ark. 257; Messero v. Oestreich, 53 Wis. 684; Nichol v. Alexander, 28 Wis. 118. In some cases the rule is stated to be the difference between the rent reserved and the fair rental value for the term, Dennison v. Ford, 412 Daly (N. Y. C. P.) 412; Foudaville v. Jourgensen, 53 N. Y. Superior Ct. 403; Coleman v. King, 19 Weekly Dig. (N. Y.) 551; Fitzgibbons v. Freisen, 12 Daly, (N. Y. C. P.) 419; Mack v. Patchin, 42 N. Y. 167. In Papaskey v. Mankivetz, 63 Wis. 322, March 1st, 1887, the court say: "We agree with Mr. Justice PAINE, in Shepard v. Gas-Light Co., 15 Wis. 318; that to ascertain the value of a business an inquiry as to the profits thereof is necessary. Probable 'value'

such damages and extra expenses in addition thereto as

and 'net profits' are convertible terms as applied to a business. Yet the law in many cases gives damages for breaches of contracts, based on prospective profits, when they are fairly within the contemplation of the parties, are not too remote and conjectural, and are susceptible of being ascertained with reasonable certainty. If the plaintiff shows himself entitled to recover for damages to his business, the character, extent, and value of his established business when the lease was executed, and before, will furnish a guide to the jury in assessing the prospective and probable value thereof had the plaintiff been permitted to transfer it to the store No. 411 Broadway. Carried on in the immediate vicinity of the old stand, and by the same person, presumably the business would have been equally prosperous. This presumption may be rebutted by proof of facts and circumstances tending to show that the business would probably have been less remunerative had it been so continued. "It was said in the argument that no case can be found which gives damages for the loss of anticipated profits, because a landlord fails to give possession at the time agreed upon. This is scarcely a correct statement. The case *Wad v. Smith*, 11 Price, 19, cited by Mr. Justice PAINE in *Shepard v. Gas-light Co.*, *supra*, seems to be just such a case. It is conceded that if the plaintiff had not a business already built up and established in the same vicinity, which with its good-will could have been transferred to the store No. 411 Broadway, there would be no basis upon which to estimate the prospective value of the business which the plaintiff would have done there had he obtained possession and carried on the business therein. In such case, profits would probably be too conjectural and uncertain to be the basis of recovery. Some of the cases refer to this distinction. In *Chapman v. Kirby*, 49 Ill. 211, the court in speaking of the case of *Green v. Williams*, 45 Ill. 206, says: 'In the case the lessee had not entered upon the term, had not built

up or established a business, and had not suffered such a loss, there was not in that case any basis upon which to estimate them.' In the present case the offer was to prove facts which would have shown a sufficient basis to determine whether there would be profits, and upon which they might be estimated." "In *Hughes v. Hood*, 50 Mo. 350, it was held that in an action of damages for withholding possession of leasehold property, where plaintiff had been a non-resident and had removed to this State for the purpose of occupying the premises, he would not be entitled to recover, on the covenant to deliver possession contained in the lease, the amount of his expenses incurred in the removal. The court said: "What connection with this covenant has the plaintiff's place of residence? It so happens that they resided in Indiana and had to remove to Missouri. This did not result from the terms of the contract. It made no kind of a difference where they resided, or how much it cost to remove their families to Missouri. If they had resided in Europe or Asia, or some other remote country, it might have cost them ten times as much to remove here as it did from Indiana. Such considerations are in no wise connected with the contract, and are too remote to be taken by the court or jury as a part of the measure of damages in a case like this. "I know that the courts have differed in regard to this subject of remote damages. Some of them have allowed such damages, while others have rejected them. We think the better rule is to exclude such damages from the consideration of the jury where they are not provided for by the terms of the contract. "The true rule of damages in this case was the difference between the rent as provided for in the lease and rental value of the premises. See *Trull v. Granger*, 4 Seld. 115. If the rental value was more than the rent reserved, the plaintiffs would be entitled to recover such difference. The rental value is not what it might be worth to the plaintiffs, but what

are the natural result of the breach.' Indeed, the true rule seems to be, and the one now generally adopted, that the true measure of damages is what the tenant has lost by the breach,' and if the circumstances are such as evince fraud on the lessor's part, and of an aggravating character, exemplary damages may also be given.'

SEC. 363. On whom binding.—The covenant for quiet enjoyment runs with the land,' and is therefore binding on the assignees of the reversion; and may be rendered available by the assignees of the term.

SEC. 364. Breaches—how plead.—A declaration alleging an eviction as a breach of covenant for quiet enjoyment must not leave it a matter of doubt whether the evictor might not have come in under title from the plaintiff himself.' When the covenant is general, the alleged

the premises would rent for in that neighborhood. They might be worth very little to the plaintiffs, or owing to some fortuitous circumstances, they might value them higher than they were really worth."

¹ In *Chatterton v. Fox*, ante, it was held proper to consider the difference between the expense of moving at the time when the tenant was ousted, and at the season of the year when the lease expired, and that the excess of expense might be recovered. See also, to the same effect, the cases cited in the last note.

² BLACKBURN, J., in *Lock v. Furze*, L. R., 1 C. P. 441. "I take it," says CHANNEL, B., in the same case, p. 451, "to be an indisputable rule of law, that, where a man enters into a contract and fails to perform it, he must make compensation to the extent of the injury sustained by the person with whom he has contracted." Farther on he says: "I think the proper principle upon which the damages should be assessed, is a full compensation to the plaintiff for that which he has lost, not limited to the amount actually paid by him." The same rule is laid down in *Robinson v. Harman*, 1 Exchq. 835, and the case of *Flu-*

reau v. Thornhill, 2 W. Bl. 1078 is distinguished, as applying to an executory, rather than an executed contract. *Williams v. Burrell*, 1 C. B. 402; *Mack v. Patchin*, 42 N. Y. 167, hold that the measure of recovery is the value of the unexpired term less the rent reserved. In Maine and Massachusetts the value of the term at the time of eviction is held to afford the true test, *Hardy v. Nelson*, 27 Me. 525; *Dexter v. Manly*, 4 Cush. (Mass.) 14; *Smith v. Strong*, 14 Pick. (Mass.) 128, and where the disturbance or eviction extends only to a part of the premises the recovery is limited to the value of that part of the premises. *Cornell v. Jackson*, Cush. (Mass.) 506; *Hunt v. Orwig*, 17 B. Mon. (Ky.) 73; *Michael v. Mills*, 17 Ohio, 601.

³ *Smith v. Wunderlich*, 70 Ill. 426.

⁴ *Lewis v. Campbell*, 8 Taunt. 715; 3 B. & Ald. 392; *Noke v. Awder*, Cro. Eliz. 875.

⁵ *Brooks v. Humphreys*, 5 Bing. N. C. 55; *Norman v. Fisher*, 1 Mod. 101; *Hall v. City of London Brewery Co. (Limited)*, 2 B. & S. 737; see a good form in *Lock v. Furze, Executor, &c.*, 19 C. B. N. S. 96; *Jeffries v. Evans*, Id. 246; *Bullen & L. Pl.* 177 (2d ed.).

breach must show an interruption or disturbance by some person having *lawful* title and right of entry.¹ When the covenant applies to the acts of any particular person or persons *therein named*, an interruption or disturbance by any such person (whether lawful or unlawful) amounts to a breach.² Where the covenant is qualified and confined to interruptions and disturbances by the lessor, his heirs and assigns, "or by any other person or persons claiming by, from, or under him, them or any of them," the breach must show an interruption or disturbance by the lessor,³ his heirs or assigns, or by some other person lawfully claiming by, from, or under him, them or some of them. One who claims under a deed of settlement made by A is a person claiming under A within the meaning of the usual qualified covenant for quiet enjoyment.⁴ So is a person who claims under a lease previously granted by the lessor, although such lease has expired.⁵ So is a superior or ground landlord, because of the privity of estate between him and the lessor.⁶ The alleged breach should always show an eviction, molestation or disturbance within the words and meaning of the covenant, and according to the real facts.⁷ And such breach must have happened during the term, and not prior to its commencement.⁸ Where an eviction has actually taken place, in assigning a breach it is sufficient to allege that at the time of the demise to the plaintiff, A B had lawful right and title to the premises, and having such lawful right and title entered and evicted the plaintiff; without showing that A B evicted

¹ *Lucy v. Leviston*, Freem. 108; 3 Keb. 168; *Dudley v. Folliott*, 3 T. R. 585; *Foster v. Pierson*, 4 T. R. 617; *Young v. Raincock*, 7 C. B. 810; *Hall v. London Brewery Co.*, and *Jeffreys v. Evans*, ante.

² *Foster v. Mapes*, Cro. Eliz. 212; *Lucy v. Leviston*, Freem. 108; *Fowle v. Welsh*, 1 B. & C. 29; *Nash v. Palmer*, 5 M. & S. 874.

³ *Corus v. —*, Cro. Eliz. 544; *Andrews v. Paradise*, 8 Mod. 318; *Lloyd v. Tomkies*, 1 T. R. 671; *Shaw v. Stenton*, 2 H. & N. 858.

⁴ *Hurd v. Fletcher*, 1 Doug. 48;

Evans v. Vaughan, 4 B. & C. 261; *Carpenter v. Parker*, 3 C. B. N. S. 206.

⁵ *Ludwell v. Newman*, 6 T. R. 458; *Coe v. Clay*, 5 Bing. 440; *Jinks v. Edwards*, 11 Exch. 775; but see *Jeffreys v. Evans*, 19 C. B. N. S. 246.

⁶ *Campbell v. Lewis*, 3 B. & Ald. 392; *Hall v. City of London Brewery Co. (Limited)*, 2 B. & S. 737.

⁷ *Carpenter v. Parker*, 3 C. B. N. S. 206.

⁸ *Ireland v. Bircham*, 2 Bing. N. C. 90.

the plaintiff by legal process, or what title A B had ; the allegation that A B having lawful right and title entered, being tantamount to saying that he entered by lawful right and title.¹

¹ Foster v. Pierson, 4 T. R. 617; R. 278; Bullen & L. Pl. 177 (2d ed.).
Hodgson v. East India Co., 8 T. ed.).

CHAPTER XXXV.

REPAIRS.

- SEC. 365. General liability.
- SEC. 366. Express covenants to repair.
- SEC. 367. Covenant to repair and keep in repair during the term.
- SEC. 368. General covenant to repair.—How construed.
- SEC. 369. Buildings erected during the term.
- SEC. 370. In case of fire.
- SEC. 371. Covenant to rebuild.
- SEC. 372. Covenant to repair after notice.
- SEC. 373. Conditional or qualified covenants to repair, &c.
- SEC. 374. Liability of landlord on express covenants to repair.
- SEC. 375. To what lessor's covenant extends.
- SEC. 376. Landlord's right to enter to repair.
- SEC. 377. What tenant must do to charge landlord.
- SEC. 378. Neglect of landlord, under obligation to repair, will not relieve tenant from liability for rent.
- SEC. 379. No implied covenant that premises are, or shall remain fit for use for purposes for which they were leased.

SEC. 365. **General liability.**—Independently of any contract, a tenant from year to year, for years or for life, must keep the premises wind and water tight,¹ and make fair and reasonable repairs, as by putting up fences,² or replacing or restoring doors or windows broken during his occupation,³ but he is not liable for the ordinary wear and tear of the premises, nor bound to rebuild in case the buildings are destroyed by fire or become ruinous from any accidental cause,⁴ nor to replace doors or windows

¹ Fisher v. Maguire, Anns. Mac. & Og. 51; Auworth v. Johnson, 5 C. & P. 239; Leach v. Thomas, 7 id. 327; 2 Platt on Leases, 182.

² Cheetham v. Hampson, 4 T. R.

318; Gregory v. Mighell, 18 Ves. 331.

³ Ferguson v. ———, 2 Esp. 590.

⁴ Torriano v. Young, 6 C. & P. 8; Horsefall v. Mather, Holt. 7;

worn out by time,¹ nor are they called upon to make lasting or substantial repairs, as to put on a new roof, or make what are called general repairs.² In the case of tenants for life or a term of years, in the absence of an express stipulation, there is no obligation upon either party as between themselves to repair.³ The fact that the

Auworth v. Johnson, 5 C. & P. 289. In *Eagle v. Swayze*, 2 Daly (N. Y. C. P.) 140, it was held that a tenant from year to year was not bound to rebuild a fallen chimney; and that where the landlord permitted a chimney to go to ruin and fall upon the tenant's goods, he was liable for the damage, and the same rule applies to a tenant from week to week, or month to month. *Johnson v. Dixon*, 1 id. 178. And in this case it was held that, where such a tenant notified the landlord of a defect in the floor of a stable rented by him, and the landlord gave an explanation of it, and said he would attend to it, but did not, and the tenant, relying upon the landlord's promise, and explanation, kept his horse there, and by reason of the insecurity of the floor the horse was injured, it was held that the landlord was liable for the damages. "The lessor is bound," said the court, "to make such repairs as are necessary to make the premises safe and secure for the purposes for which they were rented, and if their insecurity is known to him it is negligence for him not to do so."

¹ In *Auworth v. Johnson*, ante, LORD TENTERDEN, C. J., said: "It appears that this was a very dilapidated house when the defendant took it, and that they have had a very considerable quantity of work done upon it. The first question is, what are the things which an occupier of a house is bound to do? I am of opinion that he is only bound to keep the house wind and water tight and that is all he is bound to do. A tenant who covenants to repair, is to sustain and uphold the premises, but that is not the case with a tenant from year to year. A great part of what was claimed by the plaintiff consists of new materials when the old were actually worn out; for that, the defendants are clearly not liable."

² *Ferguson v. —*, ante; *Fisher v. Maguire*, ante; *Leach v. Thomas*, 7 C. & P. 827; *Thompson v. Amey*, 12 Ad. & El. 476; *Brown v. Crump*, 1 Marsh. 567; *Horsefall v. Mather*, Holt, 7; *Johnson v. Dixon*, 1 Daly (N. Y. C. P.) 178; *Eagle v. Swayze*, 2 id. 140.

³ *Johnson v. Dixon*, 1 Daly (N. Y. C. P.) 178; *Estep v. Estep*, 23 Ind. 114; *Brown v. Burrington*, 86 Vt. 40; *Brewster v. DeFremeny*, 83 Cal. 841; *Post v. Vetter*, 2 E. D. S. (N. Y. C. P.) 248; *Arden v. Pullen*, 10 M. & W. 821; *Izon v. Gorton*, 5 Bing. N. C. 501; *Starnes v. Morris*, 1 V. & B. 8; *Pindar v. Ainsley*, cited, 1 T. R. 812; *Rhodes v. Ballard*, 7 East, 116; *Pomfret v. Riccroft*, 1 Saund. 321; *Balfour v. Weston*, 1 T. R. 810. No covenant on the landlord's part is implied, even though the lessor has covenanted to repair, excepting damages by fire, or other casualties. *Witney v. Matthews*, 52 N. Y. 512; *Weigall v. Waters*, 6 T. R. 488; *Brown v. Quilter*, Amb. 619; *Surplice v. Farnsworth*, 7 M. & G. 576; *Leavitt v. Fletcher*, 10 Allen (Mass.) 121; *Davis v. Bancks*, 2 Sweeney (N. Y.) 184; *Killenberger v. Forseman*, 18 Ind. 475; *Elliott v. Aiken*, 45 N. H. 80; *Colebeck v. Girdler's Co.*, 1 L. R. Q. B. Div. 284; *Sherwood v. Sehman*, 2 Bos. (N. Y.) 157; *Clark*, 23 Mich. 104; *Morris v. Tillson*, 81 Ill. 907. He is not bound to repair water-pipes outside the premises so as to keep up a supply of water. *Codlington v. Durham*, 8 J. S. (N. Y. Superior Ct.) 412. It is no defence to an action for rent under an express covenant, that the premises were for a part of the term rendered untenable by reason of water filling the cellar and lower story, and depositing mud, &c.; and if the defendant files an answer by way of set-off, for damages sustained thereby, it will be stricken out on motion. *Neidelt v. Wales*, 16 Mo. 214.

lease contains a covenant for quiet enjoyment does not impose any liability upon the landlord to repair,¹ or that he has insured the premises and received the insurance money therefor,² nor even though the tenant's covenant to repair contains an express exception against a destruction of, or injury to, the building by fire,³ and equity has no power to relieve the tenant from his liability for rent in such cases, or to compel the landlord to repair or rebuild.⁴ But, while the tenant takes the premises as they are, and is bound to pay the rent no matter what state of disrepair they are in, and is under no obligation in the first instance to repair them unless he chooses to do so, yet in all leases there is an implied obligation imposed upon the tenant, unless excluded by the express terms of the lease, to so use the property as not unnecessarily to injury it; consequently, if the tenant breaks a window or door, or does any other injury to the building, he is bound to repair the injury, or compensate the landlord therefor. This implied obligation does not bind the tenant to repair, but to so use the property as to make future repairs unnecessary as far as possible. It is, in effect, a covenant or agreement against voluntary waste. It has never been so construed as to make a tenant answerable for accidental injuries, or for an accidental destruction of the buildings by fire or other cause.*

¹ *Brown v. Quilter*, 2 Ambler, 620.

² *Lofft v. Dennis*, 1 E. & E. 474; *Leeds v. Cheetham*, 1 Sim. 146.

³ *Weigall v. Waters*, 6 T. R. 488.

⁴ *Leeds v. Cheetham*, ante. A city's lease of a pier to a steamboat company provided that the company should keep the pier in good condition and safe and proper repair at its own expense, all the improvements to revert to the city at the end of the lease. Held, that prior oral representations by the city, that the city would make substantial repairs, leaving only ordinary repairs to be made by the company, were merged in the lease, and the company could not maintain an action for having been obliged to build a new pier, owing to decay, &c., hidden under water.

Hartford & New York Steamboat Co. v. New York, 78 N. Y. 1. Where a written lease required the tenant to keep the premises in repair, it was held that, although parol evidence was inadmissible, that, prior to the last renewal, the parties agreed that the landlord should make the repairs, a subsequent parol agreement reducing the rent for the future, which had been acted on by the parties, was obligatory. *Nicoll v. Burke*, 78 N. Y. 581.

⁵ *United States v. Bostwick*, 94 U. S. 53. In *Walker v. Tucker*, 70 Ill. 527, it was held that upon a demise of farming lands, an implied covenant is raised that they shall be used as such, and in the absence of express covenants the law implies a covenant on the part

Such a tenant is merely required to *keep the premises in as good repair as he receives them*, ordinary wear and tear and accidental injuries excepted. In other words, he is only bound to so use the premises as not to be guilty of *voluntary waste*.¹ He is not bound to replace an old floor with a new one,² or to rebuild a fallen chimney,³ or to put on a new roof,⁴ or to put in new window sashes or doors in place of those that are worn out, nor to rebuild or repair premises accidentally destroyed or injured by fire or other cause not resulting from his negligence.⁵ Nor is he bound, even though he has expressly covenanted to leave the premises in good tenable repair, to do anything that is merely ornamental, as to paper, whitewash, or paint the premises.⁶ But in all lettings of premises there is an implied understanding, in the absence of an express one, that the tenant shall use the premises in a tenant like manner, and that he will not suffer them to fall into decay, beyond such as is the result of natural wear and tear. Therefore he is bound to use the premises prudently, and to repair all breakages of windows, doors, sashes, &c., &c., that happen during his term, except such as happen as the effects of natural

of the lessee that he will not commit waste, and that he will farm the land in a husband like manner, and will not exhaust the soil by negligent or improper tillage, and that he will repair the fences, &c., so far as the rules of good husbandry require. His obligation is simply to return the premises in as good condition as he takes them. *Foster v. Batt*, 6 Mass. 63.

¹ In *Ferguson v. —*, 2 Esp. 590, the defendant rented a house as tenant at will at a certain yearly rent. After he quit possession the house was found to be very much out of repair, and the landlord caused an estimate to be made of the sum necessary to put the house in repair, and brought an action therefor. LORD KENYON, C. J., said: "A tenant from year to year is bound to commit no waste, and to make fair and tenable repairs, such as putting in windows and doors that have been broken by him, so as to prevent

waste and decay of the premises; but in the present case the plaintiff has claimed a sum for putting on a new roof on an old, worn-out house. This, I think, the tenant is not bound to do." See also remarks of TENTERDEN, C. J., in *Auworth v. Johnson*, 5 C. & P. 239. See also *Gibson v. Wells*, 1 N. R. 290; *Hitner v. Ege*, 28 Penn. St. 305.

² *Auworth v. Johnson*, ante; *Johnson v. Dixon*, 1 Daly, (N. Y. C. P.) 178.

³ *Leach v. Thomas*, 7 C. & P. 327; *Eagle v. Swayze*, ante.

⁴ *Ferguson v. —*, ante.

⁵ *Eagle v. Swayze*, 2 Daly (N. Y. C. P.) 140; *Johnson v. Dixon*, 1 id. 178; *Thompson v. Amey*, 12 Ad. & El. 476; *Horsefall v. Mathew*, Holt. 7; *Torriano v. Young*, 6 C. & P. 8; *Leach v. Thomas*, ante; *Brown v. Crump*, 1 Marsh. 567; *United States v. Bostwick*, 94 U. S. 58; *Miller v. Shields*, 55 Ind. 71.

⁶ *Wise v. Metcalf*, 10 B. & C. 329.

wear and tear or decay, and the act of God.¹ If a furnished house is let, the tenant is bound to use the premises and the furniture as well as all the appurtenances, in a proper and tenantlike manner, and leave it in as good a condition as he received it, natural wear and tear and unavoidable accidents excepted; and if the house and furniture, was clean when he received it, he must leave it clean.² But, where there is an express covenant as to the manner in which the premises shall be used, no implied covenant can be raised for *expressum facit cessare tacitum*.³ In Georgia it is held under the code, which makes it the duty of a landlord to repair demised premises that when a person lets a building for a particular purpose, there is an implied covenant not only that the building is fit for that purpose, but also that it shall remain so;⁴ but at the common law no such rule applies, except in the case of a letting of furnished houses, in which cases there is, unless the tenant has himself inspected the premises, an implied covenant or agreement, on the landlord's part, that they are suitably furnished for habitation.⁵ But in determining the extent of the liability of a landlord in this respect, in the

¹ Miller v. Shields, ante; Johnson v. Dixon, ante. In Rider v. Smith, 3 T. R. 767, the plaintiff brought an action against the defendant for not repairing a private road leading through the defendant's close, and simply declared against him as occupier. The court held this sufficient. See also to the same effect, Tenant v. Goldwin, Salk. 800; Wingford v. Wallaston, 3 Lev. 266; Rex v. Bucknall, 2 Ld. Rayd. 804. In Cheetham v. Hampson, 4 T. R. 818, an action was brought against a tenant for not repairing a fence, whereby the plaintiff was damaged, and it was upheld, LORD KENYON, C. J., saying: "It is so notoriously the duty of the actual occupier to repair the fences, and so little the duty of the landlord, that, without any agreement to that effect, the landlord may maintain an action against the tenant for not doing so."

² Stanley v. Agnew, 12 M. & W. 827.

³ Standen v. Christmas, 10 Q. B. 135.

⁴ Whittle v. Webster, 55 Ga. 180. In Georgia, the landlord is bound to repair and keep in repair. White v. Montgomery, 58 Ga. 204.

⁵ Sutton v. Temple, 15 M. & W. 61; Smith v. Marrable, 11 M. & W. 5; Wilson v. Finch Hatton, L. R., 2 Ex. Div. 836. But in an ordinary contract of letting, there is no implied warranty that the premises are tenantable. Mayer v. Moller, 1 Hilt. (N. Y. C. P.) 491. The landlord is not bound to repair, unless by special agreement, Howard v. Doolittle, 3 Duer (N. Y.) 454, and a tenant cannot, without special agreement, make repairs at the expense of his landlord. Mumford v. Brown, 6 Cow. (N. Y.) 475. To the same effect, McCarty v. Ely, 4 E. D. S. (N. Y. C. P.) 375. A subsequent parol promise to repair is void as without consideration. Speckles v. Sax, 1 E. D. S. (N. Y. C. P.) 253.

case of a furnished house, the language of the lease must control, and the question as to whether the lessee examined the premises for himself is important. If the lease merely covers a certain building, "together with the furniture therein," no implied covenant can be raised that the house either is, or shall be, *completely* furnished, nor can the tenant show by parol that the landlord agreed to supply any deficiencies in that respect. The tenant must see to it that there is sufficient furniture, or that the lease contains the whole contract, or he will be bound by the fair construction of the instrument.¹ In the case of a letting of real estate for a particular purpose, there is not, in the absence of words necessarily importing such an agreement, any implied covenant or contract that they are fit for that purpose.² This doctrine was

Unless if made upon a new and sufficient consideration. *Post v. Vetter*, 2 E. D. S. (N. Y. C. P.) 248; *Doupe v. Gennin*, 82 How. Pr. (N. Y.) 5; *Walker v. Gilbert*, 2 Robt. (N. Y.) 214.

¹ In *Wilson v. Deen*, 74 N. Y. 581, the defendant leased to the plaintiff a certain dwelling-house, "together with the furniture therein," and there was a further provision that a schedule of the furniture should be made and attached to the lease before the defendant went into possession. The plaintiff insisted, and offered to prove by parol, that the furniture was incomplete and deficient, and that the defendant agreed by parol to supply all deficiencies. The defendant never took possession because the plaintiff refused to supply such deficiencies. The court held that this proof was not admissible, and that the plaintiff was not entitled to have the lease cancelled or reformed, there being no fraud or mistake shown. *Turner v. Lucas*, 13 Gratt. (Va.) 705; *Stevens v. Cooper*, 1 John. Ch. (N. Y.) 425; *Dwight v. Pomeroy*, 17 Mass. 803.

² *Sutton v. Temple*, ante. In *Hart v. Windsor*, 12 M. & W. 86, *PARKE, B.*, gave expression to the rule thus: "We are all of the opinion that there is no contract, still less a condition implied by law, on the demise of real property, that it is

fit for the purpose for which it is let. The principles of the common law do not warrant such a provision; and though in the case of a dwelling house taken for habitation there is an apparent justice in inferring a contract of this nature, the same rule must apply as land taken for other purposes." In this case a lease of a house was taken for three years, and the tenant quit because the premises were so badly infested with bugs as to render the house unfit for habitation, but it was held to constitute no ground for the tenant's abandonment of the premises, and no answer to an action for the rent. The same principle is adopted in this country. *Meeks v. Bowerman*, 1 Daly, (N. Y. C. P.) 99; *Gilhooley v. Washington*, 4 N. Y. 217; *Bloomer v. Merrill*, 1 Daly, (N. Y. C. P.) 485; *Westlake v. DeGrau*, 25 Wend. (N. Y.) 669. In *Carson v. Godley*, 26 Penn. St. 111, it was held that where a person erects a building and leases it as a warehouse to the general government, he is liable to an owner of goods deposited therein, if the goods are injured or destroyed by the fall of the building by reason of inherent defects therein, unfitting it for the purpose for which it was let, even though the lease contained no statement of the purpose for which the building was let. This liability is predicated

well illustrated in an English case,¹ where the tenant took a demise of the vesture of land for the purposes of pasturage for a specific term, at a certain rent, and, upon turning cattle in to feed there, several of them died from the effects of a poisonous substance which had been accidentally spread there. The tenant withdrew his cattle, and declined to pay the rent, for the reason that the premises were not fit for the purposes of pasturage; but the court held that the facts constituted no defence or justification for an abandonment of the land. "I take it," said LORD ABINGER, C. B., in the last named case, at p. 61, "that if a person contracts for the use and occupation of land for a specified time and at a specified rent, *he is bound by that bargain, though he took it for a specific purpose, and that purpose be not attained.* Suppose, for instance, he took it with the object of making a handsome income out of it, as a farm. If his object fails altogether, is it to be said that he is not liable for any rent? It might have been that the grass was wet and injurious at particular seasons of the year; is he not, therefore, to pay any rent for that period? The general rule must, therefore, be that *where a man undertakes to pay a specific rent for a piece of land, he is obliged to pay the rent whether it answers the purpose for which he took it, or not.*" But where a landlord lets premises for a certain purpose, and covenants or agrees that the building shall be ready for occupancy by a certain time, *there is an implied covenant that the building shall be fit for occupancy for the purpose for which it was let, at the time named.* As if the landlord lets a building to be used as a store, a dwelling-

upon the principle that the building in such a condition amounts to a nuisance, rendering the landlord liable for any ill effects resulting therefrom. *Gandy v. Jubber*, 5 B. & S. 78. See S. C. 5 id. 485; *Rich v. Basterfield*, 4 C. B. 788.

¹ *Sutton v. Temple*, ante.

² In *Moore v. Webber*, 71 Penn. St. 429, a lease embraced a building, built of wood, the sides being only lathed and plastered. Alongside of it was a brick building,

built entirely on another lot owned by another person. The owner of the brick building removed it, leaving the wooden building unprotected from the weather on that side, in consequence of which, the lessee's goods and stock in trade were injured. It was held that the tenant had no right of action against the landlord for permitting the brick building to be torn down.

house, or a hotel, and covenants to have it ready for occupancy within a certain time, he is liable to the tenant for damages sustained by reason of any defects unfitting it for the purpose for which it was let, and the fact that the tenant goes into possession at the time fixed therefor *with knowledge of the defects*, but without objections on the landlord's part, does not bar his right of recovery, nor can he excuse his liability upon the ground that he employed skilful mechanics to make the repairs.¹

SEC. 366. *Express covenants to repair.*—A tenant is not liable for a breach of a covenant to repair, committed *before* the lease is executed, although after he went into possession. The lease does not operate as a grant, nor create any term prior to its execution.² The duration of the term is to be computed from the day mentioned in the habendum, and not from a subsequent day on which the lease was executed.³ Where the defendant, in an agreement for a lease, covenanted that he would from time to time *during the term to be granted* keep the premises in repair, and entered upon the premises and occupied them until the expiration of the term agreed to be granted: it was held, that he was liable to repair according to the covenant, although no lease had ever been made to him pursuant to the agreement, which was under seal.⁴ So the assignees of a void lease, which had been treated by all parties as valid, were held liable for rent and

¹ *Swift v. East Waterloo Hotel Co.*, 40 Iowa, 822. In an agreement to let a furnished house there is an implied condition *that the house shall be fit for occupation at the time at which the tenancy is to begin, and if the condition is not fulfilled the lessee is entitled thereupon to rescind the contract*. The defendant agreed to rent the plaintiff's furnished house for three months from the 7th of May, but having at the beginning of the intended tenancy discovered that the house was, owing to defective drainage, unfit for habitation, refused to occupy it. The plaintiffs repaired the drains, and

on the 26th of May tendered the house in a wholesome condition to the defendant, who refused to occupy or to pay any rent. Plaintiffs having sued for the rent and for use and occupation, *held*, that the state of the house at the beginning of the intended tenancy entitled the defendant to rescind the contract, and that he was not liable for the rent or for use and occupation. *Wilson v. Finch Hatton*, L. R., 2 Ex. D. 886.

² *Shaw v. Kay*, 1 Exchq. 412; *Jervis v. Tompkinson*, 1 H. & N. 192.

³ *Bird v. Baker*, 1 E. & E. 12.

⁴ *Pistor v. Carter*, 9 M. & W. 15.

repairs up to the end of the term, according to the covenants in the lease.' It must be remembered, however, that in such cases an actual tenancy from year to year "upon the terms" of the intended lease, so far as they are applicable to and not inconsistent with a yearly tenancy, is created by the entry.' Where a tenant holds over, under a lease that contains covenants for repairs, he is treated as holding under the terms of the former lease, and is still liable to repair; and if the premises are burned down or otherwise destroyed, he must rebuild them.' An agreement made to take premises from a future day, the landlord agreeing to take back the fixtures at the end of the term, provided they are in as good a condition as they *now* are, and the tenant agreeing to leave the premises in the same state as they *now* are, there being at the time another tenant in possession, and the new tenant not taking possession until the day named, refers to the state of the premises at the time when the tenant is to take possession.'

A covenant to put premises into repair at once must receive a reasonable construction, and is not limited to any specific time: therefore it is for the jury to say, upon the evidence, whether the defendant has done what he reasonably ought in performance of it.' There is no doubt that the words at once, immediately, *forthwith*, &c., mean with all reasonable celerity, but they do not bind the tenant to repair immediately.'

SEC. 367. *Covenant to repair and keep in repair during the term.*—A covenant to repair and keep the premises in repair during the term requires the lessee to keep them in repair *at all times during the term*; and if they are at any

¹ Beale v. Sanders, 3 Bing. N. C. 850.

² Tress v. Savage, 4 E. & B. 86; Pennington v. Taniere, 12 Q. B. 998.

³ Digby v. Atkinson, 4 Camp. 275; Beale v. Sanders, 3 Bing. N. C. 850; Beaven v. Delahay, 1 H. Bl. 8; Torriano v. Young, 6 C. & P. 8.

⁴ White v. Nicholson, 4 M. & G. 95.

⁵ Pitman v. Sutton, 9 C. & P. 706.

⁶ Burgess v. Boetefeur, 7 M. & G. 494; Cole Ejec. 116; Roberts v. Brett, 84 L. J. Ch. 241. When no time is specified within which repairs are to be made, it is presumed that they are to be made within a reasonable time. Lunn v. Gage, 87 Ill. 19.

time out of repair, he is guilty of a breach of covenant ;¹ for which the lessor or his assigns may, even during the term, recover damages commensurate with the injury thereby done to the reversion.² Or he may maintain an action of ejectment, if there is a proviso for re-entry applicable to such covenant.³ On a covenant to keep premises in repair, it is a breach to pull them down either wholly or partially, even so far as to open doors in a wall ; and it is a breach for which the lessor may sue and recover substantial damages during the term : nor is it any equitable defence that it was done with the "consent and acquiescence" of the lessor, *unless it appears that it was with his previous consent.*⁴ At one time it was supposed

¹ *Luxmore v. Robson*, 1 B. & Ald. 584 ; *Schieffelm v. Carpenter*, 15 Wend. (N. Y.) 400 ; *Buck v. Pike*, 25 Vt. 529. They are continuing covenants, and a recovery may be had for successive breaches as they occur. *Block v. Ebner*, 54 Ind. 544. The tenant may, when the landlord has covenanted to repair, and does not, make the repairs himself and recover the expenses of the landlord, or he may let the repairs go and sue for damages. *Hexter v. Knox*, 68 N. Y. 561.

² *Smith v. Peat*, 9 Exch. 161 ; *Turner v. Lamb*, 14 M. & W. 412 ; *Worcester School Trustees v. Rowlands*, 9 C. & P. 784, 789 ; *Bell v. Hayden*, 9 Ir. C. L. R. 301 ; *Gange v. Lockwood*, 2 F. & F. 115 ; *Smith L. & T.* 274 (2d ed.).

³ *Cole Ejec.* 422 ; *Bayliss v. Le Gros*, 4 C. B. N. S. 537 ; *Bennett v. Herring*, 8 C. B. N. S. 870.

⁴ *Gange v. Lockwood*, 2 F. & F. 115 ; *Vickery v. Jackson*, 2 Stark. 298. In order to constitute a breach of this covenant, there must be an actual state of non-repair ; a mere trifling omission on the tenant's part will not constitute a breach, such as a scratch upon the walls, a crack in a pane of glass, &c., &c. But an aggregation of such small defects, when sufficient to constitute a substantial want of repair, will operate as a breach. Leaving a quantity of rubbish in the cellar has been held not to operate as a breach of this covenant. *Thorn-dike v. Burrage*, 111 Mass. 581. Of course the question as to what con-

stitutes a breach depends upon the language of the covenant, and is essentially a question of fact for the jury. *Burdett v. Withers*, 7 Ad. & El. 186 ; *Stanley v. Towgood*, 8 Bing. N. C. 4. If a tenant specially covenants to do a certain thing, he must do it, however trifling or unimportant it may be ; as, if he covenants to restore all broken glass, or all defacements of the wall, or to keep the cellar free from rubbish, he must replace all cracked glass with new, and must repair the walls when scratched, and keep the cellar free from all rubbish, or he will be liable upon his covenant. So, if he covenants to erect a gate and make all necessary repairs thereon, he is bound to maintain and keep the gate up, and if it is removed by a trespasser, he is bound to replace it. *Beach v. Cain*, 2 N. Y. 86. So, if the tenant of a mill covenants to keep the mill and *machinery* in *necessary* repair, it has been held that he is bound to renew the machinery when it gets so old and worn as to be unfit for the purposes for which it is employed. *Coke v. England*, 27 Md. 14. But he would have been under no such obligation if the word "necessary" has been omitted, as, under the ordinary covenant to repair, the tenant is not bound to put or keep the premises in a better condition than they were when he went into possession. The question as to whether alterations or changes made in a building con-

that only nominal damages could be recovered in an action commenced during the term, but such is not now the rule.¹ Where there is a lease for a certain number of years, and thenceforth from year to year, the covenants to repair, as well as all other covenants, continue in force after the expiration of the term named, and so long as the lessee occupies. A covenant "to keep in repair," and "to keep the premises in as good repair as they now are," are identically the same covenants, and the former covenant imposes upon the tenant the duty of keeping the premises in as good condition as they were when the covenant was entered into.² A covenant by a lessee to make all small repairs that he can easily do himself, imposes no duty upon him beyond such as the law imposes upon a lessee to exercise ordinary care to prevent the deterioration of the premises;³ and the same is true where the tenant covenants to make all repairs. He is, under such a covenant, bound only to keep the premises in the condition they were in when the lease was made.⁴ But when the covenant is, that the landlord or tenant will keep the premises "in good repair," he is bound to repair all defects existing when the lease was made,⁵ and

stitutes a breach of this covenant, will depend entirely upon the language of the covenant and the evident intention of the parties to be gathered therefrom. — v. Jones, 4 B. & Ad. 126.

¹ *Marriott v. Cotton*, 2 C. & K. 553.

² *Brown v. Trumper*, 26 Beav. 11.

³ *Stalk v. Locke*, 47 Md. 562. A tenant, holding under a lease containing a covenant on his part to quit and surrender the premises, at the expiration of the term in as good state and condition as reasonable wear and tear would permit, but providing that he should have the right to make any inside alterations he might think proper, provided they did not injure the premises;—removed the partitions on the upper floors of the leased building, so as to use them for lofts instead of apartments for hotel purposes,—Held, that this was within the privilege granted him by the lease, unless the pecuniary

value of the premises as a whole was thereby injured. *Gregory v. Brooks*, 1 Hun, (N. Y. S. C.) 404.

⁴ *Flint v. Pearce*, 11 R. I. 576.

⁵ *White v. Albany Railway*, 17 Hun, (N. Y.) 98.

⁶ *Myers v. Burns*, 35 N. Y. 269. A lease contained a covenant to make repairs and also a covenant to surrender the premises in good condition, "damages by the elements excepted." It was held, that the first covenant was not qualified by the second, and that the lessor could recover damages for the omission, on the part of the lessee, to repair damages caused by the elements. *Kling v. Dress*, 5 Robt. (N. Y. Superior Ct.) 521. In a lease the lessee covenanted to keep the leased building in good repair and condition. At the time he took possession the roof and steps were in bad condition. The lessee made such repairs only as were required for his own comfort, and the steps became

the same is true as to a covenant to make all "necessary repairs."¹ The distinction between an express and an implied covenant is most marked, in reference to injuries resulting from the elements. Under an implied covenant, the tenant cannot be charged with the duty of replacing buildings destroyed by tempest, fire, flood, or inevitable accident; but under an express covenant to keep and leave the premises in repair, the lessee is bound to make good an injury from *any* cause not resulting from the act or neglect of the landlord,² as the agreement of the parties is merged in the lease, and if it was the intention of the parties to provide against the result of such casualties, it is presumed that such an exception would have been incorporated into the lease.

A covenant by the lessee to repair is sometimes made conditional on the performance of some act by the lessor; as, for instance, on his first putting the premises into repair. Under this covenant the lessee is not liable for the non-repair of any part of the premises until the lessor has entirely performed his condition.³ A covenant by the tenant to repair, "having or taking sufficient materials for the doing thereof, without committing any waste or spoil," is an absolute covenant to repair.⁴ The liability of the lessee upon a covenant to repair commences only from the execution of the lease by the lessor. He is not liable for breaches of this covenant committed before the time of the execution of the lease, although the *habendum* of the lease states the premises to be held from a day prior to its execution.⁵

rotten and the roof leaked so as to injure the walls. After the lessee's term expired the lessor had the roof shingled, gutter repaired, and new steps made. Held, that these were repairs within the covenant of the lease, and that the lessee was liable for the expense of making them. 1874, *Green v. Eden*, 2 T. & C. (N. Y.) 582.

¹ *Lockrow v. Horgan*, 58 N. Y. 635.

² *Phillips v. Stevens*, 16 Mass. 288; *Hallett v. Wylie*, 8 John. (N. Y.) 44; *Wiegall v. Waters*, 6 T. R. 650; *Green v. Eales*, 2 Q. B. 225.

In *Allen v. Howe*, 105 Mass. 241, the tenant took the premises upon condition that he should use them as a hotel. Held, Broken by his failure to rebuild after their destruction by fire.

³ *Neale v. Ratcliffe*, 15 Q. B. 916; *Cannock v. Jones*, 8 Ex. 283; *Counter v. Macpherson*, 5 Moore P. C. C. 83; *Coward v. Gregory*, L. R., 2 C. P. 153.

⁴ *Dean and Chapter of Bristol v. Jones*, 1 E. & E. 484.

⁵ *Shaw v. Kay*, 1 Ex. 412.

A covenant *by the lessee to "keep in repair the premises and all erections, buildings and improvements erected thereon during the term, and yield up the same in good repair,"* binds the lessee to leave a veranda erected by him, the lower part of which is attached to posts fixed in the ground.¹

A covenant *by the lessee of a farm, well and substantially to repair, and keep in good substantial repair, and so well and substantially repaired to yield up at the end of the term,"* binds the tenant to give up the premises in as good a state of repair as they were in when he took possession, and they must be inferred to have been then in a tenantable state.² An agreement *by a tenant to leave a farm in as good condition as he found it,* is an agreement to leave it in tenantable repair if he found it so, as it will be presumed he did.³

A covenant *by a lessee of a coal mine at the end of the term to yield up the works and mines, and all ways and roads, in such good repair, order and condition, that the works may be continued and carried on by the lessor,* does not extend to movable chattels, such as iron tram-plates fastened to wooden sleepers not let into the ground.⁴ A covenant *by the lessee of a farm, to repair and leave in good repair all buildings to be erected thereon during the term,* extends to a farm-house as well as all other buildings erected during the term, partly on the land demised and partly on land adjoining belonging to the lessor.⁵ A covenant *to repair and keep in repair all the external parts of the demised premises,* extends to a partition-wall dividing the demised house from an adjoining house.⁶

SEC. 368. General covenant to repair.—How construed.—A general covenant to repair is satisfied by the lessee keeping the premises in *substantial repair*: and a literal per-

¹ Penry v. Brown, 2 Stark. 403.

² Brown v. Trumper, 26 Beav. 11. The leaving of several loads of ashes and rubbish lying upon the premises is not a breach of such a covenant. Thorndike v. Burrage, 111 Mass. 531.

³ Winn v. White, 2 W. Bl. 840.

⁴ Beaufort v. Bates, 3 DeG. F. & J. 881.

⁵ White v. Wakley, 26 Beav. 17.

⁶ Green v. Eales, 2 Q. B. 235.

formance of the covenant is not required.¹ Where a lessee covenants to keep *old* premises in repair, he is not liable for such dilapidations *as result from the natural operation of time and the elements*;² and with a view to determine the relative sufficiency of repair, the jury may inquire whether the house was new or old at the time the lease was made;³ and what was its *then* state of repair and condition *generally*;⁴ but not in detail.⁵ A covenant to keep old premises in repair, and to leave them in repair at the end of the term, means that the lessee will, if necessary, *put them into repair*; for otherwise they cannot be kept or left in repair pursuant to the covenant. Their age, and class, and general condition, must be taken into consideration, but not particular defects or want of repair at the time the term commenced.⁶ A covenant to repair contained in an underlease, though in the same words as the covenant in the original lease, has not the same legal effect and meaning, because of the different ages and conditions of the premises at the respective times of the lease and underlease.⁷

¹ In a lease of a first-class hotel, a covenant to keep the same in repair is broken by permitting the flues to remain in such condition that the rooms cannot be used with fires. *Myers v. Burns*, 85 N. Y. 269. It seems that, under a landlord's covenant to do all necessary repairs within reasonable time after notice, *the landlord is bound not only to keep the premises in repair but to put them in that condition*. *Myers v. Burns*, 85 N. Y. 269; *Ward v. Kelsey*, 88 N. Y. 80. In an action by a lessor to recover possession of the demised premises on the ground of a forfeiture of the term by reason of a non-performance by the lessee of a covenant contained in the lease, "to keep the premises in good repair, and do all necessary repairs upon the building" (upon such premises), if it be established that the building was allowed to be out of repair at any time, the plaintiff is entitled to recover, from whatever cause such defect may have arisen, notwithstanding such lease contains an additional covenant

by the lessee to "quit and surrender the premises in as good state and condition as reasonable use and wear thereof would permit, damages by the elements excepted." There is no rule of construction which would graft the exception contained in the last covenant upon the first, as they are entirely opposite in character. *Kling v. Dress*, 5 Robt. (N. Y.) 521; *Harris v. Jones*, 1 Moo. & R. 178.

² *Gutteridge v. Munyard*, 1 Moo. & R. 334.

³ *Stanley v. Towgood*, 3 Bing. N. C. 4.

⁴ *Burdett v. Withers*, 7 Ad. & El. 186.

⁵ *Mantz v. Goring*, 4 Bing. N. C. 451; *Young v. Mantz*, 6 Scott, 277; *Belcher v. M'Intosh*, 8 C. & P. 720; *Woolcock v. Dew*, 1 F. & F. 337.

⁶ *Payne v. Haine*, 16 M. & W. 541; *Easton v. Pratt*, 2 H. & C. 676; *Haldane v. Newcomb*, 12 W. R. 135; *Schroder v. Ward*, 13 C. B. N. S. 410.

⁷ *Walker v. Hatton*, 10 M. & W. 249.

"It is now well settled that a general covenant to repair must be construed to have reference to the condition of the premises *at the time when the covenant begins to operate.*"¹ Where a very old house is leased with a covenant to repair and leave it in repair, it is not meant that the house shall be restored in an improved state, or that the consequences of the action of the elements shall be averted; *but the tenant has the duty of keeping the house in the same state in which it was at the time of the demise by the timely expenditure of money and care.*² A covenant to repair buildings and to rebuild them if necessary, compels the tenant *always during the term to keep them*

¹ Walker v. Hatton, 10 M. & W. 258; Opinion of PARKE, B. If the house is an old one, the tenant is only bound to keep it up *as an old house*, and is not obliged to give the landlord the benefit of new work. TINDAL, C. J., in Harris v. Jones, 1 Moo. & Rob. 175. It is not meant, in fact, that the old building is to be restored in a renewed form at the end of the term, so as to make the value of it greater than it was at the commencement of the term. Diminution in value, resulting from the natural operation of time and elements, falls upon the landlord; *but the tenant must take care that the premises do not suffer more damages than the operation of these causes would effect, and he is bound, by reasonable applications of labor, to keep the house as nearly as possible in the same condition as when it was demised.* Gutteridge v. Munyard, 1 Mon. & Rob. 236. He is liable for repairs only, and not for alterations, such as laying a new floor on an improved plan. Saward v. Leggatt, 7 C. & P. 618. An agreement to keep a piece of ornamental water in good and substantial repair is performed by keeping the water from bursting its banks and maintaining the sluices in working order. Bird v. Elwes, L. R. 3 Ex. 225. Unless the covenant by the tenant to repair contains an express exception of damage by fire or other casualty, he will be bound to rebuild or repair the demised premises if they should be burned down, Bullock v. Dommitt, 6 T. R. 650; Dig-

by v. Atkinson, 4 Camp. 275. See Clark v. Glasgow Ass. Co., 1 Macqueen, 668; Gregg v. Coates, 23 Beav. 38, or otherwise destroyed, or injured during the term. Brecknock Co. v. Pritchard, 6 T. R. 750.

² Gutteridge v. Munyard, 7 C. & P. 129; Burdett, Bart v. Withers, 7 Ad. & El. 136; Stanley v. Towgood, 8 Bing. N. C. 4; Mantz v. Goring, 4 id. 451. He is only bound to keep the premises in the condition in which they were when he went into possession. He is not bound to rebuild, to put on a new roof or lay down a new floor, although either would be more substantial, and serve the purposes for which the building is to be used much better. Harris v. Jones, 1 Moo. & R. 173. Ardesco Oil Co. v. Richardson, 63 Penn. St. 163; Harris v. Colburn, 3 Harr. (Del.) 338; Stanley v. Towgood, 8 Bing. N. C. 4; Mantz v. Goring, 4 Bing. N. C. 451. But, as previously stated, if he covenants "to keep and deliver them up in *good repair*," he is bound to put them in good repair, and cannot screen himself from liability for not doing so, upon the ground that the buildings were in bad repair when he went into possession. Payne v. Haine, 16 M. & W. 541; Easton v. Pratt, 2 H. & C. He must keep them in *good repair*, as he has covenanted to do, in view of their age and condition. He is bound to do this although the lease, so far as the duration of the term is concerned, is void under the Statute of Frauds. Richardson v. Gifford, 1 Ad. & El. 52.

in good repair, and a deduction in damages for their age has been disallowed.¹ Where a tenant agrees to *put the premises in habitable repair*, he is to put them in a better state than that in which he found them, and into a state reasonably fit for the occupation of the class of persons likely to inhabit them.² A direction in a will to keep buildings in good repair, has been held to mean not the state of repair in which they were at the testator's death,

¹ Worcester School Trustees v. Rowlands, 9 C. & P. 784.

² Belcher v. M'Intosh, 8 C. & P. 720. Under a covenant to *put into habitable repair*, the tenant must, if necessary, place the demised premises in a better state than that in which he found them. Belcher v. M'Intosh, 8 C. & P. 720. He is not bound to make a new house, but regard being had to the state of the premises at the time of the agreement, and to their situation, and to the class of persons who are likely to inhabit them, he is to put them into a condition fit for a tenant to inhabit. Belcher v. M'Intosh, 8 C. & P. 720. A covenant "forthwith" to put premises into complete repair is not construed as referring to any specific time; it is for a jury to say, upon a reasonable construction, whether it has been performed. Doe v. Sutton, 9 C. & P. 706. A covenant to put in repair can only be broken once for all, and therefore if a breach has been committed in the time of the lessee, and damages recovered from him by the lessor in respect of such breach, the assignee of the lessee will not be liable, Coward v. Gregory, L. R., 2 C. P. 158. A covenant to *keep premises in good repair* binds the lessee to put them into good repair with reference to their age and class, to maintain them in that state, and in that state to deliver them up at the end of the term. Payne v. Haine, 16 M. & W. 541; Burdett v. Withers, 7 Ad. & El. 136; Woolcock v. Dew, 1 F. & F. 337. He must have them constantly in repair, and if at any time during the term they are out of repair he is guilty of a breach of covenant, which is the proper subject of an action before the expiration of the lease. Luxmore v.

Robson, 1 B. & Ad. 584, 585. As this covenant is a continuing one, the recovery of damages upon it in a previous action is no bar to a subsequent action against the tenant or his assignee, so long as the premises are out of repair, but the fact may be used in mitigation of damages. Coward v. Gregory, L. R., 2 C. P. 158. It is a breach of this covenant to pull down the demised premises either wholly or partially, or to open a doorway in a wall, Gange v. Lockwood, 2 F. & F. 115; Doe v. Jackson, 2 Stark. 293; Doe v. Bird, 6 C. & P. 195, unless by the terms of the lease it is implied that additions and improvements are to be made. See Doe v. Jones, 1 B. & Ad. 126. A tenant who has covenanted to *substantially repair, uphold and maintain* a house, is bound to paint the inside woodwork, &c. Monk v. Noyes, 1 C. & P. 265. See Scales v. Lawrence, 2 F. & F. 289. Where there is a general covenant by the lessee to *repair and keep and leave in repair*, it will be inferred that he undertakes to repair buildings which may be erected during the term. Douse v. Earle, 3 Lev. 264; 2 Ventr. 126; CHANNELL, B., in Cornish v. Cleife, 34 L. J. Ex. at p. 22. On the other hand, a particular covenant to repair the demised buildings will be construed as referring only to existing buildings. See Cornish v. Cleife, 3 H. & C. 446. Covenants on the part of the tenant to *repair and keep in repair* the demised premises during the term, and to *repair specified defects within a certain time after notice*, are considered separate and independent covenants, if they severally make a complete sentence, or are found in different parts of the same deed; Horsefall v. Testar, 7 Taunt. 888;

but in *habitable repair*.¹ A tenant who covenants to repair is *liable for repairs only*, and not for the extra expense of laying a new floor on an improved plan.² It is well settled that a covenant to repair must be construed to have reference to the condition of the premises at the time when the covenant begins to operate.³ If the house is an old one he is only bound to keep it up as such, and is not bound to give the landlord the benefit of new work.⁴ It is not meant that the old building is to be restored in a renewed condition at the end of the term, so as to make it more valuable than it was when the term commenced. Decrease in value resulting from the natural operation of time and the elements, falls upon the landlord; but the tenant must take care that the premises do not suffer more damages than the operation of these causes would effect, and he is bound to make a seasonable application of labor to keep the house as nearly as possible in as good a condition as it was when it was leased to him.⁵ He is liable for repairs only, and is not bound to put on a new roof or lay down a new floor.⁶ In a case where the tenant contracted to keep a pond of ornamental water "in good and substantial repair," it was held that his covenant was met by keeping the water from bursting its banks, and maintaining the sluices and other necessary appendages.⁷ Under a covenant that the tenant shall and will substantially repair, uphold and maintain a house, he is bound to keep up the inside painting.⁸ If the tenant breaks a doorway through the wall of a house into an adjoining house it is a breach of the general covenant to keep in repair, and so is the continuing of it so broken;⁹ but the enlargement of win-

Roe v. Paine, 2 Camp, 520; Baylis v. LeGros, 4 C. B. N. S. 537, 554. See Doe v. Lewis, 5 Ad. & El. 277; Few v. Perkins, L. R., 2 Exchq. 92; but if the whole stands in the same sentence, it may be held to be one entire covenant. Horsefall v. Testar, ante.

¹ Cooke v. Cholmondely, 4 Drew. 326.

² Seward v. Leggatt, 7 C. & P. 613.

³ Walker v. Hatton, 10 M. & W. 258.

⁴ Harris v. Jones, ante.

⁵ Guttridge v. Munyard, 1 Moo. & Rob. 336.

⁶ Seward v. Leggatt, 7 C. & P. 613.

⁷ Bird v. Elwes, L. R., 3 Exchq. 225. See also, Wabash, &c., Canal Co. v. Brett, 25 Ind. 409.

⁸ Monk v. Noyes, 1 C. & P. 265.

⁹ Vickery v. Jackson, 2 Stark. 293; Gange v. Lockwood, 2 F. & F. 115; Bognis v. Edwards, id. 111.

dows, the opening of external doors, or the taking down of partitions, are no breach of a covenant to repair and keep in repair, a dwelling-house or other building, together with all such building *improvements and additions* as should be executed, set up, or made by the lessee ; for the lease evidently contemplates such alterations, and allows them to be made.' A covenant by a lessee that he will, during the term, repair, uphold, support, maintain and sustain the walls to the demised premises belonging, is broken if he pulls down a wall which divides the yard at the front of the house from another yard at the side of the house.' A covenant to repair the external parts of the demised house comprises the partition wall between it and an adjoining house.' Ordinary and natural decay is held not to be a breach of a covenant to keep a house in repair and to deliver it up in as good condition as at the commencement of the lease ; ' but a tenant who covenants to repair is bound to sustain and uphold the premises : ' he is liable to do his best to keep it in the same condition, and therefore should keep it covered and use other necessary care.' If the tenant has covenanted to repair, he commits a breach by losing or carrying away gas burners, keys, or any fixtures belonging to the building, such as shelves, drawers, wall brackets, stalls in a barn ; or by destroying or injuring the walls of the building, even though for the purpose of putting in a door for more convenient access to other rooms in the building.' So, removing a box-stall from a stable, ' neglecting to replace a gate taken away by a stranger, ' or to replace broken or worn out machinery in a mill, " or the breaking of glass, tearing up a pavement, " or, indeed, the doing of any act that diminishes the value of the premises, or neglecting to do any act necessary to keep the premises in as good a condition as

¹ Dalton v. Jones, 4 B. & Ad. 126.

² Wetherell v. Bird, 6 C. & P. 195.

³ Green v. Eales, 2 Q. B. 225.

⁴ Fitz Abr. tit. Covenant, fol. 4.

⁵ Auworth v. Johnson, 5 C. & P. 239 ; Saward v. Leggatt, 7 C. P. 618.

⁶ Ferguson v. —, 2 Esp. 590 ; Flynn v. Traak, 11 Allen (Mass.).

⁷ Doe v. Jackson, 3 Starkie, 293

Morgan v. Morse, 27 Mich. 203.

⁸ Morgan v. Morse, 27 Mich. 203.

⁹ Beach v. Crain, 2 N. Y. 86.

¹⁰ Coke v. England, 27 Md. 14.

¹¹ Doe v. Jackson, ante.

when they were leased, is a breach of this covenant. Where the tenant of a farm covenanted "well and substantially" to repair and "keep in good substantial repair," and so "well and substantially repaired" to yield up at the end of the term: it was held, that the tenant was bound to give up the premises in as good a state of repair *as when he took possession*, and that they must be inferred to have been then in a tenantable state.¹ A covenant to leave the premises at the end of the term sufficiently maintained, repaired, paved and fenced, is broken if the pavement is out of repair or the glass in the windows broken.² On a covenant as often as necessary well and sufficiently to repair, uphold, sustain, paint, glaze, cleanse and scour, and keep and leave the premises in such repair, reasonable wear and tear excepted; the tenant, if he has repaired within a reasonable time before leaving, is bound only, in addition to the repair of actual dilapidations, to clean the old paint, and is not bound to repaint.³ The fact the buildings are intended to be immediately pulled down and rebuilt by an incoming tenant, does not relieve the tenant from repairing, and the landlord may recover more than nominal damages against him for not performing his covenant to keep and leave them in good repair.⁴ While a tenant cannot charge the landlord with the expense of repairs made by him when neither party has covenanted to repair, yet, as he is under no obligation to do more than make ordinary repairs, if the landlord directs him to make other repairs, or promises that if he will make improvements, which, as tenant, he is not bound to make, he may recover therefor.⁵ But if the landlord, after the lease is executed, promises to make certain repairs, but fails to do so, no action lies against him for his failure, because his promise is without consideration.⁶ A lessee who covenants to repair cannot for that reason be

¹ Brown v. Trumper, 26 Beav. 11.

² Ryot v. Lady St. John, Cro. Jac. 329.

³ Scales v. Lawrence, 2 F. & F. 289.

⁴ Rawlings v. Morgan, 18 C. B. N. S. 776.

⁵ Hintner v. Ege, 23 Penn St. 305; Cornell v. Vauntsdalin, 4 id. 364; Oettinger v. Levy, 4 E. D. S. (N. Y.) 288.

⁶ Libbey v. Talford, 48 Me. 316; Gottsberger v. Radway, 2 Hilt. (N. Y. C. P.) 842; Phillips v. Morgan, 4 Whart. (Penn.) 226.

made liable to a third person for injuries because of a failure to repair. His liability to third persons rests upon the ground of negligence, and not upon his contractual duty to the landlord.¹

SEC. 369. *Buildings erected during the term.*—A general covenant to repair and leave in repair, extends to all buildings erected during the term;² but where, in a lease of land with buildings on it, the covenant was to repair *the buildings demised*, and to rebuild *them* if necessary, and to keep the fences in repair; it was held, that the tenant was not bound to keep in repair *addi-*

¹ Odell v. Solomon, 99 N. Y. 635.
² 1 Esp. N. P. 277; Dowse v. Cale, 2 Vent. 126; Douse v. Earle, 3 Lev. 264; Bac. Abr. Covenant (F). In a recent case in the Court of Appeals of New York, McGregor v. Board of Education of N. Y. (107 N. Y. 511) the plaintiff leased the defendant a dwelling-house with permission to change for the purposes of a public school, to be surrendered in the same condition as at the execution of the lease, "reasonable use and wear thereof as a public school, and damages by the elements, excepted." She showed the condition at the time of the renting, and the damages at the surrender. It was held that it was for the jury to decide whether they were caused by the reasonable use of the premises. New leases were made from time to time; the tenancy extending over seven years. It was held that there was no waiver of the right of action for the breach of this covenant by making the consecutive leases, and the question of the breach should relate to the final and actual surrender, and not to the technical surrenders during the tenancy. FINCH, J., said; "It is perhaps true that each new lease involved a surrender to the landlord of the lessee's possession, though they all ran to their termination, and there was no surrender of the leases themselves under the prior one. Livingston v. Potts, 16 Johns. (N. Y.) 28; Springstein v. Schermerhorn, 12 id. 357. But such surrender, instead of being actual, was implied from

the presumed intention of the parties, and devised to give consistency to the new lease. I think it never should be made to work an injustice to the contracting parties in hostility to their real agreement. It is also true, that where there has been such implied surrender, the tenant loses all rights dependent upon the continued existence and validity of the surrendered lease. Loughran v. Ross, 45 N. Y. 792. But that is because the right lost or extinguished could not survive the destruction of the lease and the ending of its term, and could exist only while the lease continued. Taking the new lease, and ending the old one, destroyed the right to remove buildings, or the right to estover, dependent wholly upon the ended lease. And I cannot discover that the doctrine ever went further, and sufficiently to include the present case. Certainly, a surrender of the lease during the term, and its acceptance by the landlord, does not extinguish rights of action already accrued. We have held that as to rent in arrears and overdue. Sperry v. Miller, 16 N. Y. 407. And where at the close of a term, there is surrender of possession by a tenant in such condition as to violate a covenant in the lease, and an acceptance of possession by the landlord, the two things occurring *eo instante*, I am not ready to admit that the right of action for a breach dies at the moment of its birth. It is true that the landlord, accepting the possession with knowledge of the

*tional buildings erected on other parts of the land.*¹ Under a lease of a farm, if the tenant is bound by his covenants to keep in repair the buildings that may be erected thereon during the term, he has been held bound to repair buildings erected by him upon adjoining lands, with the landlord's permission, *if they are used with the farm*, although upon lands not embraced in the lease.² A covenant to yield up in repair all buildings and improvements erected during the term, has been held to be broken by the removal of a veranda erected by the tenant, the lower part of which was attached to posts fixed in the ground;³ but if the buildings erected during the term be solely for the purpose of trade and manufacture, and rest merely upon blocks or pattens, the covenant to yield up in repair all buildings to be erected during the term does not extend to them,⁴ although it would be otherwise if they had been let into the soil: on this point, however, many distinctions in favor of trade have been taken. If, however, a tenant erects fixtures for the purpose of his trade on the premises, and afterwards takes a new lease to commence at the expiration of the former one, and the latter lease contains a general covenant to repair, the lessee is bound to repair the fixtures, *unless it can be shown that they were not intended to pass under the general words of the second lease.*⁵

A covenant by the lessor to repair, and by the lessee to pay rent, are independent covenants, and if the lessee goes into possession and occupies during the whole term, he cannot defend against an action upon his covenant for the rent, upon the ground that the repairs were not

facts or full opportunity to know, and without protest or claim of injury or of violated covenants, may be deemed to have admitted performance of the covenant, and waived any right of action for its breach; but the mere acceptance of possession, in and of itself, dis severed from the surrounding circumstances which characterize and qualify it, I think should not produce that result. At least, it should not flow from a mere technical or implied surrender, where there is of course neither opportunity of

knowledge nor occasion for protest, and where as here consecutive leases operate in effect as renewals, and produce in substantial result one unbroken and continuous term."

¹ Worcester School Trustees v. Rowlands, 9 C. & P. 734; Cornish v. Cleife, 8 H. & C. 446.

² White v. Wakley, 26 Beav. 17; Cole Ejec. 248.

³ Penry v. Brown, 2 Stark. R. 403.

⁴ Naylor v. Collinge, 1 Taunt. 19.

⁵ Thresher v. East London Waterworks Co., 2 B. & C. 608.

made,¹ nor will it justify him in abandoning the premises before his term expires;² but in many of the States, as the damages arise out of the same contract, he may recoup them. A covenant to keep up repairs upon a mill or other building does not bind the lessee to insure against nat-

¹ *Hill v. Bishop*, 2 Ala. 820; *Spreckels v. Sax*, 1 E. D. Smith (N. Y. C. P.) 253. In a contract for the lease of land for a term of years, it was agreed that the lessor should clear out a ditch on the land, and that the lessee should clear a portion of the land, erect certain fences, pay the taxes, &c. To an action by the lessor upon the lease, alleging a failure on the part of the lessee to discharge his covenants, the defendant, for the defence, set up that the plaintiff had failed for fifteen months to clear out the ditch, as he agreed, for which cause the defendant had abandoned the land and the lease. Held, that the answer was no bar to the suit, no damage being alleged to have resulted from the failure of the plaintiff to perform his covenant. The agreement of the lessor was not a condition precedent. *Handschy v. Sutton*, 28 Ind. 159. And in any event a covenantee can be recompensed for a breach, only to the extent that he has been injured. Where a tenant violates a covenant to pay assessments, a landlord, who has not actually paid the assessment, can recover only nominal damages. *Trinity Church v. Higgins*, 4 Robt. (N. Y. Superior Ct.) 1. A breach of the landlord's contract to build on the demised premises is no defence to his demand for rent. It is available only by way of a counter-claim or recoupment, or in a cross action. *Kelsey v. Ward*, 16 Abb. Pr. (N. S.) 98. The statute of New York, —permitting lessees to surrender buildings rendered untenable by the elements,—applies only where the injury or destruction occurs after the lessee's entry, and not where it existed at the time of making the lease. *Bloomer v. Merrill*, 1 Daly, (N. Y. C. P.) 485. A lease of basement rooms, or chambers, in a building of several stories in height, without any stip-

ulation, by the lessor or lessee, for rebuilding, in case of fire or other casualties, gives the lessee no interest in the land upon which the building stands. If the whole building is destroyed by fire, the lessee's interest in the demised rooms is terminated, and the lessor may, after the destruction of the building, enter upon the soil, and rebuild upon the ruins of the former edifice. Conversely, the tenant is entitled, in such a case, to an apportionment of rent.—1. Where he takes no interest in the soil, he cannot enjoy the premises in any manner after the destruction of the building, nor can he rebuild the edifice. He cannot have the exclusive enjoyment of the vacant space formerly occupied by the demised rooms. The effect is analogous to the destruction of demised premises by encroachments of the sea; *Rolle's Abridgment*, 236; and the established rule for the abatement or apportionment of the rent, should be applied in the former as well as in the latter case. 2. Even if the lessee's interest was terminated by the total destruction of the building, it may be doubted whether the lessor could recover rent so long as he failed to give to the demised upper rooms the support necessary to them for special enjoyment. In a lease of the upper rooms by the owner of the entire building a covenant should be employed on the part of the lessor, to give such support to the upper rooms as is necessary for their special enjoyment. *Graves v. Berdan*, 26 N. Y. 498.

² *Spreckels v. Sax*, ante; *Edwards v. Gale*, 52 Me. 860; *Arden v. Pullen*, 10 M. & W. 321; *Handschy v. Sutton*, 28 Ind. 159; *Hess v. Newcomer*, 7 Md. 325. Nor will a court of equity compel the landlord to accept a surrender. *Waters v. Weigall*, 6 T. R. 488.

ural wear and decay, but only to do ordinary repairs ;¹ nor does a covenant to repair, except "damages by the elements or acts of Providence," bind the lessee to make any repairs except those which human agency has contributed to produce.² A covenant to repair, keep, and leave

¹ *Harris v. Coulbourn*, 8 Harr. (Del.) 338. A lease of a saw-mill provided that repairs costing over five dollars should be made by the lessors and others by the lessees; "and positively, all repairs are to be made by either or both parties, as soon as there is an appearance of anything failing, to avoid a breakdown, or a heavy repair, or delay,—the head sawyers to be the judges of the mill-gearing, and the engineers to be judges of the engine and boiler." Held, that the engineers were to judge whether repairs were needed to prevent a breakdown, &c., but, in case of an actual breakdown, the right of the lessees to have repairs made, costing over five dollars, did not depend on the advice of the engineers. Such lease also provided that the lessor should select the two engineers, and the lessees the sawyers, and "to run the mill not to exceed 800 cuts of the saw per minute, the engineers to be the judges." Held, that this agreement of the lessees as to speed was independent of that of the lessors to repair; and the lessors could not set up the maintenance of an excessive speed to defeat a recovery for their neglect to repair, without showing that the lessees were in some way responsible for such excess. *Hinckley v. Beckwith*, 23 Wis. 828.

² *Polack v. Pioche*, 85 Cal. 416. There can be no breach of such a covenant until the term is ended. So long as the tenant is in the occupation he *may* repair, and thus keep his covenant. *Hopkins v. Bradford*, 1 Pittsb'gh (Penn.) 165; *Schiffin v. Carpenter*, 15 Wend. (N. Y.) 409; *Calhoun v. Wilson*, 27 Gratt. (Va.) 639. Under a general covenant to repair, on certain notice being given, the landlord can maintain no action except for the injury to the reversion. *Williams v. Williams*, L. R., 9 C. P. 659; *Atkins v. Cilson*, 9 Met. (Mass.) 52. A lease of

a glass manufactory, and of the tools and moulds connected therewith, contained a covenant by the tenant to return the tools and moulds to the landlord, at the expiration of the term, in as good order as they were in at the time of the demise, reasonable wear and tear and fire excepted; and also an agreement by the landlord that the tenant should have the privilege of expending one hundred dollars per year in repairs on said property, deducting the same from the rent. Held, that the terms of the lease neither limited the duties of the tenant in the matter of repairs, nor excused permissive waste arising from his suffering the premises to decay for want of necessary repairs. *Moore v. Townshend*, 33 N. J. L. 234. A covenant in a lease of premises to deliver up the same in as good repair, &c., does not bind the tenant to repair personal chattels connected with the premises, but not affixed thereto. *Holbrook v. Chamberlain*, 116 Mass. 161; *Allen v. Culver*, 3 Den. (N. Y.) 284. When the tenant covenants to *keep* the premises in good repair, or *in* repair, he is bound to put them in repair within a reasonable time after entry; and a right of action for a breach accrues to the landlord after the lapse of a reasonable time. *Black v. Ebner*, 54 Ind.; *Gauge v. Lockwood*, 2 F. & F. 115; *Luxmore v. Robson*, 1 B. & Ald. 534; *Worcester v. Rowlands*, 9 C. & P. 784, and the same is true as to a covenant to "maintain in repair." *Buck v. Pike*, 27 Vt. 529, and the landlord is entitled to recover the damages to the reversion, and is not limited to the mere cost of repairing. *Buck v. Pike*, ante; *Turner v. Lamb*, 14 M. & W. 412; *Smith v. Peat*, 9 Exchq. 161; *Burdett v. Withers*, 7 Ad. & El. 137. Where a tenant covenants to "keep" the premises "in good repair," he is bound to *put* them in good repair, and is not justified

the premises in repair, at the end of the term, does not bind the tenant to keep or leave them in any better repair than they were when he went into possession;¹ he is merely bound to maintain them as they are. But if he covenants to put and keep them in repair, he is bound to put and keep them in a reasonable state of repair in view of the character and purposes of the building.² A covenant to "maintain the buildings" binds the lessee to keep them in proper repair at all times during the term, and the lessor may maintain an action upon the covenant at any time, either before or after the term has expired,³ even without previous notice to him of want of repair.⁴ Where the lease contains a covenant to repair, which is unqualified, and also a covenant to surrender the premises in good condition, "damages by the elements excepted," the covenant to repair is not qualified by the exception in the covenant to surrender, so as to excuse the tenant from repairing damages caused by the elements.⁵ A covenant to pay the expenses of repairs is not a covenant to repair.⁶ Where a lessee covenants to make certain improvements upon the premises, in the absence of any special stipulation as to the time within which they shall be made, he has the whole term in which

in keeping them in bad repair simply because he found them in that condition. *Payne v. Haine*, 16 M. & W. 541. Whether the tenant has repaired within a reasonable time, or whether he has made such repairs as he ought to have made, is a question for the jury. *Doe v. Sutton*, 9 C. & P. 706. A tenant who covenants to "repair and leave in repair" has the whole time to repair in. *Doe v. Davis*, 1 E. & E. 408, and if an action is brought during the tenancy for the breach of a covenant to keep in repair, only nominal damages have been held to be reasonable. *Marriot v. Cotton*, 2 C. & K. 558. Under a covenant to repair and keep in repair, or to repair forthwith, *Doe v. Sutton*, ante, or to repair before a certain day, and by inevitable accident or the act of God it becomes impossible to repair forthwith, or by the day named, performance as soon as

possible after is sufficient. *Main's Case*, 5 Coke, 21; *Shep. Touch.* 173; *Compton v. Allen*, *Styles*, 162; *Walton v. Waterhouse*, 2 Saund. 420, n. 2; *Anonymous*, *Dyer*, 88 a.

¹ *West v. Hart*, 7 J. J. Marsh. (Ky.) 258.

² *Harris v. Coulbourn*, 8 Harr. (Del.) 338; *Harris v. Jones*, 1 Moo. & Rob. 173a.

³ *Buck v. Pike*, 27 Vt. 529.

⁴ *Hayden v. Bradley*, 6 Gray (Mass.) 425.

⁵ *Kling v. Dress*, 5 Robt. (N. Y. Supr. Ct.) 52; *Lawrence v. Wood*, 4 Bos. (N. Y.) 354; *Williams v. Williams*, L. R. 9 C. P. 659; *Wood v. Day*, 7 Taunt. 646; *Doe v. Lewis*, 5 Ad. & El. 277; *Roe v. Paine*, 2 Camp. 520; *Doe v. Meux*, 4 B. & C. 666. But see *Bull v. Wyeth*, 8 Allen (Mass.) 275.

⁶ *Loomis v. Ruelter*, 9 Watts, (Penn.) 516.

to make them.¹ If the covenant is merely "to leave the buildings in repair," no action lies against him until the term has ended, even though he tears the buildings down, because he may comply with the covenant at any time before the term is ended.² When a tenant has covenanted to make certain specified repairs, or to keep certain specified portions of the premises in repair, and he fails to do so, and the landlord, for the preservation of the property, or in compliance with the orders of the board of health, is compelled to make such repairs, the tenant is liable to him for the cost of such repairs in addition to the agreed rent.³

SEC. 370. *In case of fire.*—If a lessee covenants to repair and keep the premises in repair during the term, not excepting damage by fire or the elements, he is bound to rebuild them if burnt down by accident, negligence, or otherwise.⁴ It is of no importance how the covenant is worded; unless it is qualified, the lessee is bound to rebuild in case the buildings are destroyed by fire or other casualty during the term; the tenant, if the burden of the covenant rests upon him, or the landlord, if he is the covenantor, must rebuild. Thus, a covenant "to repair, uphold and support," or to "well and sufficiently repair," or to keep in repair and leave as found,⁵ or to "repair and keep in repair,"⁶ to keep in "good repair, natural wear and tear excepted,"⁷ to make "all necessary repairs,"⁸ to deliver up "in tenantable repair,"⁹ or to

¹ *Pulthrop v. Bergner*, 52 Penn. St. 149.

² *Shep. Touch.* 173.

³ *Hull v. Burns*, 17 Abb. N. C. (N. Y.) 817.

⁴ A covenant to repair and keep in repair binds the lessee to rebuild in case of the destruction of the building by fire. *Hay v. Holt*, 91 Penn. St. 88; *Linn v. Ross*, 10 Ohio, 412; *Phillips v. Stevens*, 16 Mass. 238; *Bullock v. Dommitt*, 6 T. R. 650; *Earl of Chesterfield v. Duke of Bolton*, Comyn, 267; *Poole v. Archer*, Skin. 210; *Digby v. Atkinson*, 4 Camp. 275; *Clarke v. Glasgow Insurance Co.*, 1 Macq. H. L. Cas. 668.

⁵ *Digby v. Atkinson*, 4 Camp. 275; *Walton v. Waterhouse*, 2 Saund. 420; *Beach v. Crain*, 2 N. Y. 86.

⁶ *Phillips v. Stevens*, 16 Mass. 238; *Ely v. Ely*, 8 Ill. 523; *Pym v. Blackburn*, 8 Ves. 34; *Bigelow v. Collamore*, 5 Cush. (Mass.) 231.

⁷ *Green v. Eales*, 2 Q. B. 225.

⁸ *McIntosh v. Lown*, 49 Barb. (N. Y.) 550; *Tilden*, 13 Gray (Mass.) 108; *Cowell v. Lumley*, 39 Cal. 151; *Cline v. Black*, 4 McCord, (S. C.) 481.

⁹ *Leavitt v. Fletcher*, 10 Allen (Mass.) 121; *Myers v. Burns*, 35 N. Y.; *Beach v. Crain*, ante.

¹⁰ *Ross v. Overton*, 8 Call. (Va.)

"deliver up the premises in as good a condition as they now are,"¹ all impose upon the covenantor the duty of rebuilding or restoring premises destroyed or injured by the elements; but under a covenant to deliver up as they now are, it has been held that the covenantor is not bound to rebuild or restore premises destroyed or injured by inevitable accident, as the covenant is not strictly a covenant to repair, but for re-delivery;² but this latter doctrine is opposed to the weight of authority. He must continue to pay his rent in the same manner as if no fire had happened;³ and it makes no difference in

¹ Jacques v. Gould, 4 Cush. (Mass.) 384; Ross v. Overton, ante; Ely v. Ely, ante; Kramer v. Coak, 7 Gray, (Mass.) 550.

² Horwitz v. Anderson, 25 Tex. 557; Warner v. Hitchins, 5 Barb. (N. Y.) 660. and in McIntosh v. McLawn, 49 id. 550, it was held that a covenant to "repair and leave in the same repair as at date of lease" did not impose upon the tenant the duty of rebuilding.

³ Belfour v. Weston, 1 T. R. 810; Baker v. Holtzapfcell, 4 Taunt. 45; Holtzapfcell v. Baker, 18 Ves. 118; Izon v. Gorton, 5 Bing. N. C. 501; Parker v. Gibbins, 1 Q. B. 421; Lofft v. Dennis, 1 E. & E. 474. As to buildings and other erections, the tenant is not excused from performance by the act of God, as if the building is blown down by a tempest, swept away by a flood, Compton v. Allen, Styles, 162; Main's Case, 5 Coke, 20 b; Polack v. Pioche, 34 Cal. 416; Canal Co. v. Pritchard, 6 T. R. 750, or falls by reason of a sinking of the soil, or of its defective construction. Arden v. Pullen, 10 M. & W. 821. But he is not liable to restore that which can be restored only by natural processes, as trees blown down, &c., because it cannot be done by man, and the covenant cannot be treated as requiring *impossible* things to be done. Main's Case, ante. If the tenant excepts "natural wear and tear," or "usual wear and tear," or "fair wear and tear," he is liable for all want of repair except such as results from natural and usual causes; and even though the injury results from the act of a tres-

passer the tenant must repair it, and is entitled to recover the damages from the person wrongfully causing the injury. Cook v. Champlain T. Co., 1 Den. (N. Y.) 91; Polack v. Pioche, 35 Cal. 416. But under such a covenant, with such exceptions, he is not bound to repair in case the building falls by reason of inherent defects therein, Arden v. Pullen, 10 M. & W. 821, but he cannot put an end to his term because the landlord neglects to repair defects arising from such wear and tear. Hess v. Newcomer, 7 Md. 325; Arden v. Pullen, ante. But such exception does not relieve him of liability to rebuild in case the buildings are destroyed by fire or flood, if he covenants to repair, as if he covenants to "well and sufficiently repair, support and uphold," Walton v. Waterhouse, 2 Saund. 420; Beach v. Cain, 2 N. Y. 86; Digby v. Atkinson, 4 Camp. 275, or to "keep in repair and leave as found," Phillips v. Stevens, 16 Mass. 233; Ely v. Ely, 80 Ill. 532; Bigelow v. Catlamore, 5 Cush. (Mass.) 231; Pym v. Blackburn, 3 Ves. 34, or where he covenants to leave "in tenantable repair," Ross v. Overton, 3 Call. (Va.) 309, or to "keep in good repair." Tilden v. Tilden, 13 Gray (Mass.) 103. Indeed, where there is a general covenant to repair, says MR. PLATT, 2 Platt on Leases, 186, it is binding on the tenant, *whatever may be the cause of the dilapidation*, whether the injury or destruction proceeds from the act of a stranger, Green v. Eales, 2 Q. B. 225, from "storms, floods, the Queen's ene-

that respect, even though the landlord has, with the knowledge of the tenant, insured the premises, and received during his term the sum insured, without expending it, or any part thereof, in rebuilding or restoring the premises to their former condition.¹ Even where the lessee's covenant to repair contains an express exception of damage by fire and tempest, whereby he is

mies, lightning, or accidental fire.' Walton v. Waterhouse, 2 Saund. 420; Walton v. Johnson, 2 Keb. 585; Paradine v. Jane, Styles, 47; Anonymous, Dyer, 324 a, pl. 34; Bokannon v. Lewis, 37 B. Mon. (Ky.) 370; Compton v. Allen, Sty. 163; Poole v. Archer, 2 Show. 401; Chesterfield v. Bolton, Com. 627; Bullock v. Dommitt, 6 T. R. 650; Pym v. Blackburn, 8 Ves. 88; Monk v. Cooper, 2 Stra. 763; Canal Co. v. Pritchard, 6 T. R. 750. Where there is no covenant to repair, but a mere covenant to deliver up in good repair, and condition, "natural wear and tear excepted," he is not bound to rebuild in case the premises are destroyed by such casualty. Warner v. Hitchins, 5 Barb. (N. Y.) 666; Horwitz v. Anderson, 25 Tex. 557. But if the covenant is "to repair and leave in as good repair as at the date of the lease," he is bound to rebuild in case the building is destroyed from any cause. Jacques v. Gould, 4 Cush. (Mass.) 384; Overton v. Ely, ante; Kramer v. Cook, 7 Gray (Mass.) 550. *Contra*, see McIntosh v. Lown, 49 Barb. (N. Y.) 550. "The tenant's liability under this covenant," says MR. PLATT, 2 Platt on Leases, 187, "is founded on a distinction between a duty created by the act of the law and the act of the party; for, where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and hath no remedy over, there the law will excuse him, as formerly in the case of waste, if a house were destroyed by the tempest, or by enemies, the lessee was excused; but when the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it

by his contract." Paradine v. Jane, Styles, 47. Equity will not relieve a tenant from the hardship of a covenant to repair, even where performance becomes impossible, nor will it relieve him from the payment of rent, when the premises have been destroyed, even though the lessor is bound to repair and has received the insurance upon the buildings. Hare v. Groves, 3 An. & W. 693; Holtzapffell v. Baker, 18 Ves. 116; Leeds v. Cheetham, 1 Sim. 146. It is upon this principle that, if a tenant covenants to repair, under a penalty, and the premises are destroyed by the elements, or any casualty to which he does not in any wise contribute, he will be excused from the penalty, but will be liable upon his covenant to repair, because he has expressly contracted to do so. Anonymous, Dyer, 38 a, pl. 10. It is laid down in some legal works, Lawrence v. Twentiman, 1 Rol. Abr. 450, pl. 10; Shep. Touch. 174, as a rule of law, that the presence of the plague in a house is a good excuse for the non-performance of a covenant to repair by a particular day, but is liable if he does not perform the covenant within a reasonable time after the plague has disappeared. But this doctrine is inconsistent with the general doctrine, and is by no means free from doubt. 2 Platt on Leases, 188; Thompson v. Miles, Rolle's Abr. 426; T. R. 384; Shubrick v. Salmond, 3 Burr. 1637; Barker v. Hodgson, 3 M. & S. 267. Indeed, it is held that the fact that performance is impossible will not operate as a defence to an action upon a bond conditioned to be void, upon the making certain repairs. Wood v. Avery, 2 Leon, 188.

¹ Leeds v. Cheetham, 1 Sim. 146; Loft v. Dennis, 1 E. & E. 47.

exonerated from rebuilding, the landlord is not bound to rebuild or repair in the event of loss or damage by fire or tempest, unless there is in the lease an express covenant by him to that effect,¹ and a mere covenant for quiet

¹ Weigall v. Waters, 6 T. R. 488. In Levey v. Dyess, 51 Miss. 501, it was held that a lessee is not responsible for demised property accidentally consumed by fire, unless by his covenant he has made himself liable. It was also held that a covenant to "*redeliver or restore the property in the same condition or plight*" does not bind the tenant to rebuild in case of casual consumption by fire. In this case the stipulation in the lease was, that at the expiration of twelve months the lessee was to deliver to the lessor a saw-mill, implements, tenements, &c., "*without damage, except the running, wear and usage.*" During the term of the lease the property was destroyed by casual fire. It was held that the lessee was not responsible. In Fowler v. Payne, 49 Miss. 32; Leavitt v. Fletcher, 10 Allen (Mass.) 119, and Abby v. Billups, 35 Miss. 680, it was held that a covenant "to repair" bound the lessee to "*rebuild.*" See Walton v. Waterhouse, 3 Saund. 422. In Maggott v. Hernsberger, 8 Leigh (Va.) 586, the grist-mill, saw-mill and carding machine, the subject of the lease, were accidentally destroyed by fire. The court, commenting on the covenant of the lessee, "*to return the said property with all its appurtenances,*" said in effect: "There are strong considerations that would render the court averse to extending the doctrine of the tenant's liability in any degree beyond the decided cases. To bind him to so unequal a risk, his covenant ought to be special and express, and so clear as to leave no doubt that he intended to take the risk." This was held to be no more than a covenant "not to hold over." In Harris v. Nicholas, 5 Munf. (Va.), the covenant was to return the slave well clothed. The court remarked that, by looking at the mere words, the hirer was bound at all events to return; but such could not have been the intention

of the parties. In Nave v. Berry, 23 Ala. 888, the covenant was, "*the said house with the appurtenances thereto attached, to deliver up on, &c.*" In the judgment, the distinction is taken between a covenant to deliver up, and to repair. The latter binds the lessee to rebuild in case of loss by fire, whilst the former is an obligation not to hold over. That distinction is also enforced in Phillips v. Stephens, 16 Mass. 238. SMRALL, J., who delivered the opinion in Levy v. Dyess, deducted the following propositions from the authorities: 1. That the lessee is not responsible to the lessor for the accidental, casual destruction by fire of the property demised, unless by the covenants he has made himself so. 2. In construing the covenants, the cardinal rule is the intention of the parties; and the courts will not extend or enlarge the obligations of the lessee beyond the plain meaning and intention of the parties. If there is not an express stipulation to restore edifices and structures destroyed by casualty, or some covenant which is equivalent thereto, such as a covenant to "uphold and repair," or "to repair," then the loss must fall upon the reversioner. * * * 3. A covenant to redeliver or restore to the lessor, in the same plight and condition, usual wear and tear excepted (or other words of like import,) does not bind the covenantor to rebuild in case of casual destruction by fire, or impose the burden of the loss on him. 4. The contemplation of the parties to such a covenant, applied to a house, saw-mill, machinery and appliances, is, that the lessee will take ordinary reasonable care of the property, according to its nature, and that he will surrender possession when his right to enjoy has expired. It is not within the intendment and according to general understanding, that such stipulation imposes on the tenant the responsibility of insurer. If that

enjoyment during the term is not sufficient.¹ Thus, where a farmhouse was burnt by accident, it was held that the landlord was not bound to rebuild.² It may be that neither party is liable to rebuild or repair; but, nevertheless, the tenant must continue to pay his rent as though no fire had happened, unless the covenant for payment of rent contains an express exception relieving him therefrom,³ or the lease contains an express proviso for cesser or suspension of the rent in case the premises are destroyed or damaged by fire; and even then, a proportionable part of the rent will be recoverable before the premises are rebuilt or repaired, unless the proviso is clearly to the contrary.⁴ On the other hand, if there is a covenant by the tenant to keep the premises in repair, and also a covenant to insure them for a specific amount against fire, on their being burnt down, the tenant's liability on the former covenant is not limited to the amount to be insured under the latter covenant.⁵ A stipulation to "repair and deliver up," binds the lessee to rebuild in case of a destruction of the buildings by fire; but a naked stipulation to "deliver up," simply imposes an obligation against holding over.⁶ But if the lessee covenants that the premises "are to be kept in repair, and maintained in good repair, and maintained in good condition by the lessee," and the printed clauses in the lease provide that he shall at the end of the term quit and deliver up the premises "in as good order, repair, and condition, reasonable use and wearing thereof, fire and other unavoidable casualties excepted, as the same now are, or may be put into" by the lessor, and that the lessee shall keep the buildings insured against loss by fire, in a specified sum payable to the lessor, does not impose upon the lessee liability for the repair of injuries which occur through ordinary wear, or fire, or other

greater risk is assumed, it must be clearly and explicitly set forth in the contract.

¹ Brown v. Quilter, 2 Amb. 619.

² Bayne v. Walker, 3 Dow, 238.

³ Monk v. Cooper, 2 Stra. 763;

⁴ 2 Ld. Raym. 1477.

⁵ Bennett v. Ireland, E. B. & E. 326.

⁶ Digby v. Atkinson, 4 Camp. 275.

⁷ Nave v. Barry, 22 Ala. 282.

unavoidable casualty.¹ If there is no covenant to repair

¹ *Ball v. Wyeth*, 8 Allen (Mass.) 275. In *Miller v. Morris*, 5 Tex. L. J. 113, it was held that a covenant to redeliver or restore to the lessor, in the same plight and condition, usual wear and tear excepted, or other words of like import, does not bind the covenantor to rebuild in case of casual destruction by fire, or impose the loss on him. A distinction was drawn between that case and *Rosa v. Overton*, 3 Call. (Va.) 309; *Phillips v. Stevens*, 16 Mass. 238; *Bullock v. Dommitt*, 6 T. R. 650; *Digly v. Atkinson*, 4 Camp. 275, and others, in which there was an express covenant to repair. In *Wainscott v. Silvers*, 13 Ind. 500, the rule is stated, that the tenant is not responsible for buildings accidentally burned down during his tenancy, unless he has expressly covenanted or agreed to repair. That it is not sufficient to charge him that he agreed or covenanted to surrender the premises at the end of his term in the same repair or condition that they were in at the time of the contract. In *Warner v. Hitchins*, 5 Barb. (N. Y.) 566, the covenant was to surrender up the possession of the premises, at the expiration of the lease, in the same condition they were in at the date of the lease, natural wear and tear excepted. The building was destroyed by fire, and it was held that the covenant did not amount to one to repair, and that the tenants were not bound to rebuild. *McIntosh v. Lown*, 49 Barb. (N. Y.) 554; *Howeth v. Anderson*, 25 Tex. 557; *Trigg v. Hally*, 4 Humph. (Tenn.) 493; *Graham v. Swearingin*, 9 Yerg. (Tenn.) 276; *Harris v. Nicholas*, 4 Munf. (Va.) 483; *Townsend v. Hill*, 18 Tex. 426; *Levey v. Dyess*, 51 Miss. 501. In *Halbret v. Forrest City*, 84 Ark. 246, it was held that whenever there is an agreement of the tenant to redeliver the premises in any prescribed condition of good order, it is a question of the real intention and meaning of the parties whether he meant to become bound to rebuild, in case of their casual destruction by fire during the term. In arriving at this meaning, the circumstances

and probable intention of the parties will be considered. In *Warren v. Wagner*, 75 Ala. 188, it was held that an express stipulation in a lease, binding the lessee to surrender the premises "in as good order and condition as the same now are, reasonable use and wear and tear excepted," is merely the expression of an obligation, which the law would imply in its absence, and does not impose upon the lessee a liability to repair or to restore, in the event of a destruction of the premises, or a material part thereof, during the term, by fire, or other unavoidable accident. A lessee of premises destroyed during the term by unavoidable accident is not excused from the performance of an express provision or covenant to pay rent for the term, unless he has protected himself by an express stipulation for the cessation of rent in that event, or the landlord has covenanted to repair or rebuild; but there is an exception to this general rule that the destruction must not be of the entire subject matter of the lease, leaving nothing capable of holding and enjoyment by the lessee. When the lease is of lands and tenements, with the right of quarrying stone during the term, a destruction of a lime kiln located on the lands does not excuse the lessee from payment of the rent for the balance of the term, although the use of the kiln may have been the principal consideration moving the lessee to enter into the lease, and from it he may have expected to have derived his principal profits. The eviction of a tenant consists in the disturbance of his possession, his expulsion or amotion, by title paramount, or by the entry and act of the landlord depriving him of the enjoyment of the demised premises, or a portion thereof, and operating partially or wholly, a bar to the right of the landlord to demand rent falling due in the future. A mere trespass by the landlord upon the demised premises, not intended by him as a permanent amotion or expulsion of the tenant, or to deprive him of the possession and enjoyment of the premises, may entitle the ten-

in the lease of a building, where the land on which it rests is not also leased the destruction of the building terminates the relation of landlord and tenant, and no rent for the building can be recovered subsequent to its destruction.¹ By the lease of apartments in a building, in a town for purposes of trade, the lessee takes only such interest in the subjacent land as is dependent upon the enjoyment of the apartments rented and is necessary thereto. The relation of landlord and tenant, upon such a lease, is dissolved by the destruction of the apartments by fire, and thenceforward the lessee has no interest in or right to the land, of which an eviction can be predicated.² Of course it is competent for the parties to provide that the rent shall cease, or the term end, in case the premises are rendered untenable for any cause,³ but in such a case, unless the premises are rendered wholly untenable, the tenant is not released from his liability for rent. Thus, where there was a covenant that, if the building should be destroyed and burned down, and the lessor should not rebuild within a reasonable time, the lessees might terminate the lease, it was held that a partial destruction of the building, that could be repaired without rebuilding, did not come within the meaning of the clause.⁴

ant to damages, but does not amount to an eviction. If the landlord by himself, or by the act of another, which he authorized, or to which he assents, enters upon and takes possession of a material portion of the demised premises, the entry and possession constitute, at the election of the tenant, an eviction from the whole, authorizing an abandonment of the lease, and absolving the tenant from the payment of rent falling due in the future, or a partial eviction only, discharging the rent *pro tanto*. Nothing, however, less than an entire abandonment or surrender will operate a dissolution of the tenancy, and a suspension or discharge of the whole rent. When the landlord enters upon, and takes possession of the demised premises, there is no duty vesting upon the tenant to demand of the landlord restoration, and of

consequence there can be no necessity for a refusal to restore, as an element of eviction. When the act of the husband is relied on as an eviction of the wife's tenant, his agency or her assent to his act may be proved by circumstantial evidence, and may be inferred from his employment in the transaction of her business, her acquiescence in his former acts in reference to the leasing of the premises, their relationship and the nature and character of the act imputed to him; the inference, however, in such case, is one of fact, to be drawn by the jury, and not one of law.

¹ Ainsworth v. Ritt, 88 Cal. 89.

² McMillan v. Solomon, 42 Ala. 356. Compare Austin v. Field, Abb. (N. Y.) Pr. N. S. 29; Buerge v. Boyd, 25 Ark. 441.

³ Kip v. Merwin, 52 N. Y. 542.

⁴ Vanderpool v. Smith, 2 D. (N. Y. C. P.) 135.

SEC. 371. **Covenant to rebuild.**—Where a lessee of three buildings covenanted to pull them down and rebuild three others in their place, and that he would repair the houses so agreed to be built, *and also that he would repair the demised premises*, and leave the said premises in repair; and he pulled down the three and built *four* in their stead; it was held, that though he was obliged to build only three houses, yet he was bound to deliver up *all* in repair; the last covenant being general, and not confined, as the former, to the houses agreed to be built.¹ Where, however, in a lease of four buildings for 99 years, the lessee covenanted within two years to put them in good repair, and keep them in repair during the term, and further, within the first fifty years of the term, to take down the buildings “as occasion may require,” and in the place thereof to erect four new brick messuages: it was intimated by the court that, if with-

¹ *Douse v. Earle*, 8 Lev. 264; *Dowse v. Cale*, 2 Vent. 126. A stipulation in the lease of an entire “store now being erected by” the lessor, that, if the premises be destroyed or damaged by fire, the rent “shall be suspended or abated until they shall have been put in proper condition for use and habitation by the said lessor,”—construed to render a more expensive building voluntarily erected by him upon the land after destruction of such store by the Boston fire of 1872, a part of the realty and inuring to the benefit of the lessee during the term. *Rogers v. Snow*, 118 Mass. 118. A lease for five years required the lessee to erect a store on the premises, and to pay, besides the rent, all taxes and assessments, with clause of re-entry on non-payment. It also provided that at the end of the term the lessors should take the store at an appraisal, or give a lease for five years more at a rent to be fixed by arbitrators. At the end of the term arbitrators were chosen by the parties, who indorsed and signed on the lease the following: “This lease is renewed by arbitration for the term of five years, at the yearly rent of \$125, payable on the same terms as the

first five years, excepting from the operation of this lease any assessment for stone pavements.” Held, as against the lessee, who had entered on the second term, a good renewal of the lease upon the original terms, with the exception made by the arbitrators, and also of the provision for a renewal, which had now spent its force. *Brand v. Frumveller*, 82 Mich. 215. A covenant to pay for buildings erected by the tenant during the term, does not entitle the tenant to recover for repairs or improvements made upon old buildings. *Smith v. Cooley*, 5 Daly (N. Y. C. P.) 401. Where a lessor was bound by his lease to furnish, at his expense, the necessary power, as furnished at the execution of the lease, for the lessee’s machinery in the demised premises, and a blast was necessary to his forges, and was actually supplied when the lease was made, and for several years previously from machinery on the lessor’s premises,—Held, that so essential an incident would be considered as passing by the lease, and not to have been held by the lessee, under a mere license, revocable at the will of the lessor. 1875, *Thorp v. Field*, 26 N. J. Eq. 82.

in the fifty years the houses should be so repaired as to make them completely and substantially as good as new houses, the "occasion" on which the new houses were to be built did not arise.¹ A lease was granted of a piece of land with two unfinished buildings thereon, and the lessee covenanted to complete them within two months, and also to keep them in repair during the term, and there was a proviso for re-entry on breach of any of the covenants; the two buildings were never finished, and years after the expiration of the two months they were much dilapidated. It was held, that a person to whom the reversion was assigned long after the expiration of the two months might maintain ejectment for the subsequent non-repair.² A general covenant to repair and keep in repair during the term, includes a liability to rebuilt such erections as may be destroyed by fire, tempest, flood, or other accidents during the term.³

SEC. 372. *Covenants to repair after notice.*—The covenant to repair generally, and the covenant to repair within a certain time after notice, are generally held to be distinct and independent covenants; *'but if they immediately follow in such a manner that they must be joined to make the sentence complete, they are construed as one entire covenant,* and the latter part respecting notice is held to qualify the former: *'as, where there is a covenant to repair at all times, when, where, and as often as occasion shall require, and, at the farthest, within three months after notice of want of reparation.'* A covenant to repair during the term after three months' notice, and to leave the premises in repair at the end of the term, are distinct clauses; and therefore notice is unnecessary to sustain an action for not leaving in repair at the end of the term. A covenant to repair runs with the land, and consequently is binding, not only upon the lessee but also upon his assignee or any person claiming by

¹ Evelyn v. Raddish, 7 Taunt. 411.

² Bennett v. Herring, 3 C. B. N. S. 370.

³ Weigall v. Waters, 6 T. R. 650.

⁴ Baylis v. LeGros, 4 C. B. N. S.

537; Goatley v. Paine, 2 Cam.

520; Morecraft v. Meux, 1 C. & 346.

⁵ Horsefall v. Testar, 7 Taunt.

⁶ Slater v. Stone, Cro. Jac.

under, or through him.¹ This rule applies to an assignee by way of mortgage,² or to an equitable assignee.³ "Until lately," says MR. PLATT,⁴ "a mere depositary of a lease by way of mortgage, whether he had entered into possession of the premises or not, was compellable to take an actual assignment, and so clothe himself with the legal estate and its attendant liabilities ;⁵ but the alarming consequences of this doctrine, especially to the commercial community, who are in the habit of taking deposits of leases as securities for loans coupled with the circumstances of its being discountenanced by the profession, caused the point to be reviewed ; and it is now determined that the lessor has no equity to compel the depositary to take an assignment of the lease, or the depositary to assign it."⁶ Nor will the court compel an equitable assignee, at the suit of the lessor, to discover whether the lease has been assigned to him, and enforce him to perform it in specie.⁷ The plaintiff is left to recover at law as well as he can.⁸

SEC. 373. *Conditional or qualified covenants to repair, &c.—* Where a lessee covenanted that *from and after the amendment and repair* of the demised buildings, &c., by the lessor, he would repair and sustain them during the term, and at the end thereof leave them well and sufficiently repaired, and the lessor sued him for non-repair of a dove-house, which at the commencement of the term was in good and sufficient repair ; it was held, after ver-

¹ Caugham v. King, Cro. Car. 221 ; Shelby v. Hearne, 6 Yerg. (Tenn.) 512 ; Spencer's Case, 5 Coke, 16 a ; Keeling v. Morrice, 12 Mod. 871 ; Dean &c., of Windsor's Case, 5 Coke, 24 a ; Laugher v. Williams, 1 Salk. 816 ; Allen v. Culver, 3 Den. (N. Y.) 284. The reason for this is, that the covenant affects the estate of the term and of the reversion in the hands of the owner, for the time being. If the charge is cast upon the lessor, the rent is the greater ; if on the lessee, he pays the less rent ; and as an assignee has the benefit, it is but reasonable that he should be subject to the charge, Buckley v. Park, 1 Salk. 816, and an assignee

of the reversion may sue upon the covenant, if the premises continue ruinous in his time, although they became so before the assignment. Mascall's Case, 1 Leon. 62 ; 2 Platt on Leases, 184.

² Pelkington v. Shaller, 1 Eq. Ca. Abr. 47, pl. 6.

³ Wilson v. Leonard, 3 Beav. 373 ; Close v. Wilberforce, 1 id. 112.

⁴ 2 Platt on Leases, 184.

⁵ Lucas v. Commerford, 1 Ves. 285 ; Flight v. Bentley, 7 Sim. 149.

⁶ Jenkins v. Portman, 1 Keen, 435 ; Moores v. Choat, 8 Sim. 508.

⁷ Goddard v. Keate, 1 Vern. 87.

⁸ Copland v. Laporte, 3 Ad. & El. 517.

dict for the plaintiff, that the defendant's covenant was conditional only, and that no action could be maintained against him for the alleged breach, the plaintiff not having first amended and repaired the premises pursuant to the lease.¹ So, where a lessee agrees to keep the buildings and premises in repair, *the same being first put into repair by the lessor*, the latter words create a covenant on the part of the lessor to do all such repairs,² and also a condition precedent, and until the lessor has put *all* the demised premises into repair, the lessee is not liable for the non-repair of any part.³ So, where the tenant covenants to repair, the landlord "finding timber sufficient" for the reparations; the landlord cannot maintain an action against the tenant for a breach of the covenant, without alleging that he did find sufficient timber. So, where a tenant covenanted to repair and keep the buildings on the premises in repair, "being allowed" a certain class of timber; it was held, that in order to create an obligation on the tenant to repair, the landlord must supply, or at all events be ready and willing to supply, such timber.⁴ But where, in a lease for lives, the lessee covenanted that he "would, from time to time, and at all times, during the estate thereby granted, at his own proper costs and charges, well and sufficiently repair, amend, maintain, uphold and keep all and singular the demised premises in all manner of needful and necessary reparations whatsoever, *having or taking* in and upon the premises competent and sufficient house-bote, hedge-bote, fire-bote, plough-bote and gate-bote for the doing thereof, without committing any waste or spoil;" in an action by the lessor for not repairing, it was held, that the lessee's covenant to repair was absolute, and that the words "having or taking, &c.," "without committing waste or spoil," did not amount to a condition precedent that there should be a sufficient supply of that kind of timber on the premises, but only to a license to the tenant to take it if there were, for repairs, even if made nec-

¹ Cannock v. Jones, 3 Exch. 233; 5 id. 713.

² Neale v. Ratcliff, 15 Q. B. 916.

³ Thomas v. Cadwallader, Willes 496; cited 1 E. & E. 487.

⁴ Martyn v. Clue, 18 Q. B. 100.

sary by his own default, without being liable for waste.¹ Where a lessee covenants to complete the buildings under the direction and to the satisfaction of some person to be named by the lessor, the naming of such person is a condition precedent to the performance by the lessee of his covenant to complete the buildings.² A covenant by the lessee to redeliver the premises in as good condition as they are when he received them, "unavoidable accidents and the usual wear and tear excepted," does not oblige him to rebuild in case of its accidental destruction by fire;³ nor is a tenant bound to rebuild in case the buildings are destroyed by the elements, or any casualty, unless there is an express covenant to repair, &c.; and a mere provision that the tenant will return the premises with all the appurtenances, does not amount to such a covenant.⁴

SEC. 374. *Liability of landlord on express covenants to repair.*—A landlord may bind himself to do all or any of the repairs during the term by an express covenant or promise to that effect in the lease or agreement; but in the absence of any such stipulation he is not liable *to do any repairs whatever*.⁵ Whatever he agrees to do in this respect should be inserted in the lease or agreement,⁶ as the tenant cannot rely upon any oral promise made before or after the lease or agreement is executed.⁷ There is no implied duty in the owner of a house which is in a ruinous and unsafe condition to inform a proposed tenant that it is unfit for habitation, and no action will lie against him for an omission to do so, *in the absence of an express*

¹ Dean and C. of Bristol v. Jones, 1 E. & E. 484.

² Hunt v. Bishop, 8 Exch. 675;

Hunt v. Renaut, 9 Exch. 635;

Coombe v. Greene, 11 M. & W.

30. But see Cannock v. Jones, 8

Exch. 283; 5 id. 713.

³ Howeth v. Anderson, 25 Tex.

532.

⁴ Maggort v. Hansberger, 8 Leigh

(Va.) 532.

⁵ Arden v. Pullen, 10 M. & W.

321; Gott v. Gandy, 5 E. & B. 845;

Loft v. Dennis, 1 E. & E. 474.

⁶ Tidey v. Mollet, 16 C. B. N. S. 298.

⁷ Seago v. Deane, 4 Bing. 459;

Haldane v. Newcomb, 12 W. R.

135; Spreckels v. Sax, 1 E. D. S.

(N. Y.) 253; Walker v. Gilbert, 2

Robt. (N. Y.) 214; Doupe v.

Gamin, 32 How. Pr. (N. Y.) 5;

Proctor v. Keith, 12 Ky. 252;

Gottsberger v. Radway, 3 Hilt. (N.

Y. C. P.) 342; Libbey v. Tilford,

48 Me. 316.

*warranty or active deceit.*¹ Even though the lessor covenants to do repairs, the lessee cannot charge him with a breach of such covenant, without notice of the repairs that are necessary, because the lessor is not on the spot, and may not know what repairs are necessary; but the lessor may charge the lessee without any such notice.² The fact that a landlord voluntarily goes on and makes repairs, does not raise a presumption that he contracted to repair.³ A covenant to repair binds the tenant if he holds over after his term has expired.⁴ The covenants of a landlord to repair, or make additions to the premises, are subordinate to the tenant's covenant to pay rent, and do not defeat the rent *in toto* unless the tenement is worthless for the purpose for which it was rented, without such repairs and additions. But, if the tenant goes into possession before such covenant on the landlord's part is performed, he is entitled to recover the damages resulting to him therefrom, and may recoup the same against the rent; or where the statute is broad enough for that purpose, may set them off against the rent and recover the balance if they exceed the rent.⁵ Where a building is occupied by several tenants and the landlord exercises proper care in the construction and repair of the several parts, he cannot in the absence of notice or knowledge of the defects be held responsible for injuries resulting to any of the other tenants from the improper or negligent use of the premises by other tenants or by strangers. Thus, in a Michigan case,⁶ the plaintiff

¹ Keates v. Earl of Cadogan, 10 C. B. 591.

² Moore v. Clark, 5 Taunt. 90.

³ Moore v. Webber, 71 Penn. St. 479, and the fact that part of the building is taken under a statute, and the lessor receives the compensation therefor, raises no such covenant by implication. Praye v. Bancroft, 112 Mass. 76.

⁴ O'Leary v. Delany, 63 Me. 584.

⁵ Prescott v. Otterstatter, 85 Penn. St. 534.

⁶ Kenney v. Barns, (Mich.) 11 West Rep. 490. Handyside v. Powers, (Mass.) 5 N. E. Rep. 179; where it was held that the landlord could not be held liable for injuries

to a person, sustained by falling down an elevator well, the door of which was left unfastened by a tenant who had surreptitiously obtained a key to the lock leading to the elevator, said DEVENS, J., "Without considering whether the plaintiff was an intruder or licensee in entering on the premises, we do not find there was evidence in the case of neglect on the part of defendant. The door to the elevator had been provided with a lock, had been locked, and the key deposited in defendant's office. This was the only key known by defendant, and his agent to exist, and it

iffs leased the ground floor and basement of a building owned by the defendant, and occupied it as a dry goods store. The upper stories were occupied by various tenants. On the second floor there was a hall which was leased to a society known as the Royal Templars. There was a watercloset on the second floor, which was leased with the hall and was looked after and taken care of by a janitor employed by the Royal Templars. The water closet was also by agreement, used by the employes of a furniture firm, which occupied the third floor. The defendant employed a man by the name of Livingstone as her agent for the leasing and management of the building.

On the 8th day of April, 1886, by a stoppage of the waste-pipe, the closet overflowed, and the water soaked or dripped through the ceiling upon the goods of plaintiffs, damaging them. They brought suit for the damage, alleging that it was the duty of the defendant to attend to the closet and keep the same in good order, so that no damage might happen to the goods of the plaintiffs, and that the damage was done by the neglect of the defendant to perform this duty—"by reason of the carelessness, negligence, and lack of attention" on the part of said defendant.

No fault in the original construction of the closet was averred in the declaration. On the contrary, it was alleged that the "watercloset was so connected with the public sewerage system of the city of Detroit, that, when it was in good order, the refuse and waste matter deposited therein passed off through the said public sewerage system."

The question of the defective construction of the closet was therefore not involved in the case.

¶ The evidence on the part of the plaintiffs showed that about six months after they took possession of the prem-

in its place in defendant's office after the accident. There was evidence that a key had been procured by King, and used, but without the consent or knowledge of defendant or his agent; and that the neglect of King in unlocking the

door, and leaving it unlocked, had been the cause of the injury. But the act of King in obtaining a key without knowledge of defendant, and his subsequent carelessness, cannot be attributed to defendant."

ises there was an overflow from this same closet, doing some damage. They notified Livingstone of it, and he promised to have the matter attended to, and some plumbing was done by his direction. Seven or eight months after this first overflow there was another. Livingstone was again notified, and promised to remedy it. This was in the winter of 1883 and 1884. They made no further complaint about the closet to Livingstone until after the overflow upon which suit was brought; nor did it appear that they had any cause of complaint.

It appeared from the whole testimony, without any dispute, that the overflow was caused by an improper usage of the closet by some one not known. The closet, as found by the plumber on the morning of the overflow, was "stopped, in what is called the trap, or goose-neck, with paper." The valve in the closet was out of order, so that the water ran all the time, and, the waste-pipe being stopped up, it ran out upon the floor. The valve was kept open by chips in back of it. When these were taken out, the valve closed. The chief obstruction to the waste-pipe was newspapers used in the closet. If medicated or "ordinary watercloset paper had been used, there would have been no danger of obstructions; the only danger comes from the abuse."

The janitor of the Royal Templars had a key to the closet. He was last inside of it on the night of the 7th of April. It was all right then. He locked it when he came away. On the night of the 8th he did not open the closet. His key opened the door at the outside into the main entrance to the hall. He carried the key with him all the time. The employees of the furniture store had access to this closet by a separate passage leading from the furniture rooms. When the door was open into the main hall to the building, there was nothing to prevent persons from the street entering and using the closet. The court below directed a verdict for the defendant.

MORSE, J., said "It is not shown that the defendant in the lease to the plaintiffs, covenanted to keep the closet or any part of the premises in repair. Yet I

stone, her agent, as shown by the testimony, did repair the closet whenever he was notified that any trouble with it existed.

But this overflow of water was not caused by the closet or any of the pipes therein being out of repair. The whole difficulty, leaving out, as we must, the question whether the closet was properly constructed, arose from the negligence or wanton act of someone in stopping up the waste-pipe and leaving the valve open.

Livingstone, the agent, or Mrs. Barns, the principal, had no care over or custody of this closet, or any keys to the same. It was under the control of the Royal Templars, who employed a man to take care of it and keep it in order. No one else had access to it without their permission, excepting the furniture firm who also had a key to it. The stoppage occurred in the night, after the store of plaintiffs was closed, and presumably late in the evening.

We do not see how the defendant can be made liable for these damages. Even if she were bound by the covenants of the lease to plaintiffs to keep the premises in repair, of which there is no evidence, there was nothing out of repair of which defendant had any notice or was bound to take notice. By a temporary filling up of the waste-pipe the damage was occasioned.

The defendant did not have the care of this closet; the duty of keeping it clean and in working order, when in repair, rested upon others. She or her agent did not know of this stoppage, causing the leak, and the circumstances preclude any presumption of such knowledge; and, under the facts shown, she was not bound to know of this obstruction. It was not her duty to employ someone night and day to watch this closet.

It would be unwarranted to find that she was guilty of negligence."

Where the landlord covenants to keep the premises in repair, he does not thereby guarantee that they shall never in fact be out of repair, and he cannot be held liable for an injury resulting from defects which would

not have been discovered by him by the exercise of reasonable diligence in ascertaining what repairs are necessary. Thus, in a recent New Jersey¹ case it appeared that in July, 1883, the defendant let to the plaintiffs for a residence, three rooms on the third floor of No. 90 Morton Street, Newark, with the right to use for certain purposes a balcony extending along the rear of the third story of Nos. 86, 88 and 90, Morton Street; that the landlords agreed to attend to all repairs; that the plaintiffs occupied the premises from the letting until December 22, 1884, when, while they were using the balcony, to hang out clothes (one of the authorized purposes) the rail of the balcony broke and they both fell to the ground, sustaining the injuries for which this suit was brought; that at the time of the accident the rail had become somewhat rotten and the nails holding it were somewhat rusted, in consequence of which the rail gave way under the strain; and that the plaintiffs were not chargeable with any contributory negligence.

The trial justice charged the jury that if they found that the landlords had contracted to make repairs to the premises, and that the railing was at the time of the accident in an unsafe and insecure condition for the purpose for which it was used, then a *prima facie* case for the plaintiffs was shown.

The jury found in favor of the plaintiffs; upon appeal DIXON, J., said: The charge of the court was, in effect, that the contract of the landlords to make repairs, to attend to all repairs, was equivalent to a guaranty that the premises should not become unsafe or insecure through lack of repair. If ignored, any inquiry as to whether the landlords were or by due diligence would have been apprised that repair was needed. In this respect we think the landlords' duty was misinterpreted.

The contract did not require that the premises should be prevented from getting out of repair, but rather implied that they would be likely to become so. Nor did it expressly provide when, in such case, the landlords should

¹ Frank v. Couradi, (N. Y. Sup. Ct.) 9 Centl. Rep. 679; See also Leavitt v. Fletcher, 10 Allen 119; Green v. Eads, 2

restore the premises to good condition; hence, to ascertain the time or times for making repairs, we must invoke the usual legal implication (applicable to contracts indefinite as to the time of performance), that they must be performed with reasonable diligence and promptness. This legal rule, applied to the present contract, imposed upon the landlords the duty of properly inspecting the premises and of making such repairs as a due inspection would show to be necessary. *But it cannot be stretched so as to include an obligation to repair what a reasonable examination would not discover to be in need of repair.* Such straining would deprive the rule of the very element which makes it applicable to contracts in general, the underlying idea of reasonableness. This principle does not at all trench upon the established rule of the common law: that express covenants bind the covenantors to do as they have agreed if human power can accomplish it; for the principle does not touch the expressed terms of the contract, but supplies only that which the parties have omitted to provide for, and which nevertheless is requisite to render their verbal stipulations effectual. A new trial was granted, to enable the parties to have the finding of the jury upon the question whether the defendant would, by reasonable diligence, have ascertained that the railing of the balcony needed repairs.

The landlord cannot where he has been guilty of no fault or negligence in reference thereto, be held chargeable for injuries resulting to one tenant by the negligence of another tenant, although the landlord supplied the instrumentality through the negligent use of which the injury resulted. And, although, from the negligent use of such instrumentality by one tenant, damage to other tenants is not only a possible, but a probable consequence. It would be absurd to say that a landlord who has piped a building for gas, which is dangerous if not properly used, is responsible to one tenant for the consequences of its careless or improper use by another tenant; or, having brought water into the building in the usual way, and provided the usual instrumentalities for its control, and which, if properly used can be productive of no ill results,

is liable to one tenant, for the carelessness of another tenant in the use of such instrumentalities. Such a rule, would prevent the use of modern improvements in tenement houses, and public buildings, and would deprive tenants of luxuries which are now generally regarded not only as necessary, but also, especially in cities and large towns, as indispensable, comfortable enjoyment; and the rule may be said to be, that a landlord cannot be held chargeable for the negligence of one of his tenants in the use of the premises or of any of the instrumentalities with which it is provided, unless some fault or negligence upon his part has conduced to the production of such injurious consequences.¹

SEC. 375. To what lessor's covenant extends.—The lessor's covenant to repair extends only to the buildings *as they were when leased*, and if the tenant afterwards erects additions thereto, the covenant does not extend to them.*

¹ *McCarthy v. York Co. Savings Bank*, 74 Me. 315; 43 Am. Rep. 591; *Ditchett v. R. R. Co.* 67 N. Y. 427; *Stewart v. Putnam*, 127 Mass. 408; *Mellen v. Morrill*, 126 Mass. 545; *Murray v. Richards*, 1 Allen (Mass.) 414; *Sutton v. Banker*, 8 Gray (Mass.) 197; *Lowell v. Spaulding*, 4 Cush. (Mass.) 277; *Rich v. Basterfield*, 4 C. B. 783; *Carstairs v. Taylor*, L. R. 6 Exchq. 217.

* *In Leoder v. Kemp*, 2 C. & P. 675, the landlord covenanted to repair and rebuild. The building was of two stories only, but the tenant added a third story. The building was destroyed by fire and the landlord rebuilt a two story building. The court held that this was all he was bound to do. "It appears to me," said BEST, C. J., "that the landlord is to rebuild only what he let; for a landlord would be in a desperate situation if he were bound to rebuild everything which a tenant may think proper to set up. He might be ruined in many cases." A covenant to repair, either on the part of the lessor or lessee, extends only to buildings already constructed, unless otherwise provided in the lease. Thus, "a lessor let three tenements and a lot adjoining thereto," and the lessee cove-

nanted "well and sufficiently to repair, sustain, and keep the said tenements or dwelling-houses, field or plot of ground and premises, and every part thereof, as well in houses, buildings, walls, hedges, ditches, fences, gates, as in all other needful and necessary reparations whatsoever, when and as often as occasion shall require during the said term, and at the end or sooner determination thereof the said premises, so well and sufficiently repaired, into the hands and possession of the said lessors, peaceably to leave and yield up." It was held that the covenant did not extend to houses afterward built in the field. *Cornish v. Cliefe*, 8 H. & C. 446. Where a lease contains several distinct and independent covenants, a recovery in a former action for a breach of one of them is no bar to an action for a breach of another. A lessee's covenant in a lease, "to keep the buildings and fences in good repair, except natural wear and tear," binds him to rebuild in case of accidental destruction by fire or otherwise. *McIntosh v. Lown*, 49 Barb. (N. Y.) 550; *Coward v. Gage*, 10 R., 2 C. P. 153.

When the landlord sells the premises, and contracts with the purchaser to repair them at the expiration of the tenancy, he is bound to repair whenever and however the tenancy is determined, and cannot protect himself upon the ground that the term of the tenant has not expired by limitation.¹ When the lessor covenants to repair, it is his duty to keep the floors tight if they were so originally constructed, or if the lessee's business requires it.* So, generally, where a lessor lets a building for a particular purpose, and covenants to repair it, it is his duty to put it in such a state of repair as the business requires. Thus, where a lessor leased a hotel, and covenanted to keep it "in good necessary repair," it was held that this covenant obliged him to make and to maintain the premises fit for use as a hotel, and among other things to provide new chimney flues, if necessary to carry off smoke and gas from rooms where it was proper to have fires.* Where the tenant has the right under his lease to deduct the expense of repairs from the rent, he cannot claim compensation by way of damages because the premises were not kept in repair, unless he shows that the lessor had notice of the necessity for repairs;⁴ nor where a tenant has covenanted to repair can he excuse compliance with the covenant* because the expenses will largely exceed his expectations when the lease was made, because of latent defects in the building, and a promise by the landlord to allow him some deductions from the rent on that account is without consideration and not binding upon him.* If the lease provides that the lessee shall take the premises "in the condition in which they now are and leave them in the same good order at the end of the term," the lessee is not liable for repairs made by the landlord without his request.* A provision in a lease that "the lessor shall not be liable for any repairs on the premises during the term, the buildings now being in perfect order," has reference only to the condition of

¹ Goodson v. Goldsmith, 2 C. & P. 555.

² *See* v. Kelsey, 88 N. Y. 80.
³ *See* v. Burns, 35 N. Y. 269.

⁴ Walcott v. Sullivan, 6 Paige Ch. (N. Y.) 117.

⁵ Bryne v. Romaine, 2 Edw. Ch. (N. Y.) 445.

⁶ Wicker v. Lewis, 40 Ill. 251.

the buildings as edifices *in perfect repair*, and not to the condition of the surroundings, or the purity of the air in the vicinity either then or at any future time.' The fact that the lessee covenants to repair does not make him responsible for the expense of repairs made by the landlord, even though the landlord made the repairs because the tenant unreasonably neglected to do so.' A party leasing premises to an Odd Fellows lodge, contracting in the instrument that they shall be suitable for the purposes of the lessee, cannot if the premises are not suitable, nor rendered so within a reasonable time, recover rent therefor; and as to what constitutes a reasonable time the jury must decide.'

The lessor who has covenanted to repair cannot excuse the non-performance of his covenant upon the ground that the tenant has been guilty of negligence or want of care. The tenant's negligence in exercising due care to prevent injury to himself from the lessor's failure to repair, may, however, be considered in mitigation of the damages, but cannot be set up to defeat the action.' Where a landlord has covenanted to keep the roof of a leased building in repair, in order to make him liable for damages sustained because of its disrepair, the tenant must show either that the landlord knew of the defect, or that he notified him thereof.'

SEC. 376. Landlord's right to enter to repair.—A landlord has no right to enter to make repairs, even though he has covenanted to do so, unless there is a stipulation in the lease to that effect, or the tenant has consented to permit him to do so.' But assent may be implied from

¹ Foster v. Peyser, 9 Cush. (Mass.) 242.

² Wicker v. Lewis, 40 Ill. 251.

³ Young v. Collett, Mich. Sup. Ct., Oct. 28, 1886.

⁴ Flynn v. Trask, 11 Allen (Mass.) 550. In Watson v. Hooton, 4 Ill. App. 294; it was held that a lessee is entitled to damages to improvements and repairs upon a house, arising from a breach of the lessor's covenant to keep the roof in repair, even though he has paid the rent for the greater part of the

term. His rights will not be prejudiced by the fact that he received from others, while not himself in occupation, the same rent he paid. But in Arnold v. Clark, 45 N. Y. Superior Ct. 252, it was held that a breach of a landlord's agreement to repair does not render him liable as in tort for injury to person or property.

⁵ Thomas v. Kingsland, 12 Daly (N. Y. C. P.) 315.

⁶ Barker v. Barker, 2 C. & P. 557; Worcester, &c., Trustees v.

the acquiescence of the tenant; and in any event, no very heavy damages would be imposed upon him for the trespass, if he made the repairs with proper care and reasonable despatch.¹ If the tenant refuses to permit the landlord to enter to make repairs, he cannot maintain an action for a breach of the covenant as to such repairs.

SEC. 377. *What tenant must do to charge landlord.*—Where the landlord has contracted to repair the premises, or keep them in repair, the tenant is bound to give him notice *to make them*,² and if he neglects to give such notice, but goes on and makes the repairs, they are treated as gratuitous, and the landlord is *not* liable therefor,³ but if, after giving such notice, the landlord neglects unreasonably to make the repairs, and they are necessary, the tenant may make them, and deduct the expense thereof from the rent;⁴ or he may bring an

Rowland, 9 C. & P. 273; Neale v. Wylie, 3 B. & C. 533. The right of the landlord, during the tenancy, to enter and make such permanent repairs as are essential to prevent waste and indispensable to the due protection of his reversionary interest, extends to the putting a new roof upon a building leased, to prevent it going to ruin. But where a house is in the occupation of tenants or subtenants, the landlord is bound, in the exercise of this right, to see that all reasonable care and skill is exercised in the removal of the old and in the putting on of the new roof, to prevent injury by the elements to those who are in the occupation of the house. Sulzbacher v. Dickie, 51 How. (N. Y.) Pr. 500. S. P. 1874, Glickauf v. Maurer, 75 Ill. 289. A lease providing that the landlord may, at reasonable hours in the daytime, enter the premises, to examine or to make such repairs and alterations therein as shall be necessary for the preservation thereof, or of the building, gives a clear right and authority (in case the excavation of the adjoining property threatens injury or destruction to the premises leased), to enter the premises and shore-up

and strengthen the same, by running large pieces of timber known as "needles" through the basement, to support the floor of the store occupied by the tenants. And the landlord is not liable in damages to the tenant for an interruption of his business during such a period as is reasonably required to do the work.⁵ White v. Mealio, 87 N. Y. Superior Ct. 72.

¹ Colley v. Steeton, 2 B. & C. 273.

² Favrot v. Mettler, 21 La. An. 220. But if a definite time within which they are to be made is agreed upon, no such notice is necessary after the time has passed. Gerzbek v. Lord, 33 N. J. L. 240; Makin v. Wilkinson, L. R. 6 Exchq. 25; Wolcott v. Sullivan, 6 Paige Ch. (N. Y.) 117; Coope v. England, 27 Md. 14; Walker v. Gilbert, 2 Robt. (N. Y. Superior Ct.) 214. If the landlord has covenanted to repair, he is entitled to notice that the premises are out of repair, before he can be made liable upon his covenant. Thomas v. Kingsland, 12 Daly (N. Y. C. P.) 315.

³ Favrot v. Mettler, 21 La. An. 220.

⁴ Westermeir v. Street, 21 La. An. 714; Diggs v. Maury, 23 id. 59; Hexter v. Knox, 63 N. Y. 561; Buck v. Rodgers, 39 Md. 322.

action therefor, but the declaration should aver that the landlord had notice of the defects and of the plaintiff's making the repairs and of the expense thereof, as want of repair is a matter about which the landlord is not presumed to know unless the defects existed at the time when the premises were rented.¹ Unless the landlord has contracted to repair he is under no obligation to do so, even though the premises are in a defective condition when leased, as there is no implied contract that the premises are or shall be tenantable;² and if a tenant goes on and makes *necessary* repairs even, he cannot recover the expense thereof of the landlord,³ and this is so where the tenant has stipulated to make repairs to a certain amount, but makes them in excess of such amount. The landlord is not liable to him for the excess above what he contracted to make.⁴ The tenant may, as previously stated, where the landlord has covenanted to repair, and after notice to do so has failed to repair within a reasonable time, go on and make the repairs and charge the landlord with the expense thereof; *but he is not bound to do so*, but may proceed against the landlord upon his covenant, and recover as damages the value of the use of any portion of the premises for the purposes for which he rented them, rendered untenable because of the landlord's failure to make repairs.⁵ If the landlord covenants to repair, he is bound to *keep* as well as put the premises in repair, even though the tenant has entered,⁶ or even though they result from the negligence of the tenant,⁷ and it also binds him to rebuild in case the buildings are destroyed by fire or other casualty;⁸ but a covenant "to build" does not impose upon him the burden of rebuilding if the buildings are subsequently destroyed.⁹ He must make suitable repairs, and as to what are suitable, is to be ascertained from the character of the building, the uses to which it is to be devoted, and the tenant's

¹ *Norfleet v. Cromwell*, 64 N. C. 1.

² *Hexter v. Knox*, ante. Nor can he recover for permanent repairs. *Kline v. Jacobs*, 68 Penn. St. 57.

³ *Biddle v. Reed*, 32 Ind. 529.

⁴ *Benjamin v. Heeney*, 51 Ill. 492.

⁵ *Hexter v. Knox*, 63 N. Y. 561.

⁶ *Ward v. Kelsey*, 33 N. Y. 180.

⁷ *Flynn v. Trask*, 11 Allen (Mass.) 550.

⁸ *Leavitt v. Fletcher*, 10 Allen (Mass.) 110.

⁹ *Cowell v. Lumley*, 22 Cal. 151.

position in trade, or socially.' As to what amounts to disrepair, it may be said that any defect that is productive of injury, or discomfort, or that detracts from the comfortable enjoyment of the premises for the purposes for which they were hired, comes under this head: as defective flues, broken' windows, loose sashes, broken locks, swollen doors, leaky roofs, outer doors shrunk so as to let in wind or water, rickety floors, stairs, and every species of defect that renders the use of the premises less commodious or comfortable than they would be if in such a condition as it is reasonable to presume the parties intended that they should be.' If the tenant's business is interrupted while the landlord is repairing with reasonable despatch he can recover no damages therefor; nor is the rent suspended during the period that the landlord is rebuilding in place of buildings that have been destroyed by fire.' If the landlord fails to repair, the tenant is not absolved from rent, but must take his remedy upon the covenant,' or he may recoup his damages against the rent.'

SEC. 378. Neglect of landlord, under obligation to repair, will not relieve tenant from liability for rent.—*Nothing short of an actual eviction from the premises by the landlord, or through his agency, or by title paramount, or a surrender of the premises by the tenant, and their acceptance by the landlord, will, at the common law, relieve the tenant from his liability for the rent for the full term.*' Therefore it follows that even though the landlord covenants to repair the premises, and to keep them in repair, his failure

¹ Cohen v. Habenicht, 14 Rich. (S. C.) Eq. 421.

² Myers v. Burns, 35 N. Y. 269.

³ Cohen v. Habenicht, 14 Rich. (S. C.) Eq. 421; Black v. Ebner,

544; Flynn v. Trask, ante.

⁴ Ebner v. McCarty, 4 E. D. S. (P.) 249. And an entry

is not an eviction, even if the tenant did not require

repairs made. Peterson v. Peterson, 100 Mich. 100, 60 N. W. 100 (1894).

⁵ Harr. (Del.) 878. See also ante.

⁶ Sutton v. Temple, 12 M. & W. 52; Surplice v. Farnsworth, 7 M. & G. 576.

⁷ Black v. Ebner, ante; Holbrook v. Young, 108 Mass. 88.

⁸ Harrison v. Lord North, 1 Ch. Cas. 84; Paradine v. Jones, Alleyn, 27. PARKE, B., in Hart v. Windsor, 12 M. & W. 78. As to what constitutes an eviction, see Chapter on "Eviction," post.

to do so affords no bar to an action for the rent.¹ Formerly the tenant was obliged to resort to his action for a breach of the covenant,² and such is still the rule if the tenant claims damages in excess of the rent; but if he is satisfied merely to offset the one against the other, or if his damages are less than the rent, he may now, in most of the States, *recoup* his damages against the rent;³ or in those

¹ This doctrine has long been maintained, and in Brooke's Abr. "Dette," fol. 220, pl. 18, is an account of an action for rent, in which the tenant plead that by the custom of London the landlord was bound to repair and uphold the dwelling-house sufficiently for habitation; and that, before the rent accrued, the house, by reason of a tempest, became so ruinous that the defendant could not abide in it, and that the defendant thereupon requested the landlord to amend the house, and he would not, whereupon the defendant quit the house. The court held that the plea was bad, and constituted no defence to the action for the rent. In *Monk v. Cooper*, Strange, 708, the lessee covenanted to repair the premises, casualties by fire excepted. The premises were destroyed by fire during the term, and the landlord refused to rebuild. The court held that the defendant was nevertheless liable for the rent for the whole term, and could not offset his damages, by reason of the failure of the landlord to rebuild, against the rent, and the case previously cited from *Alleyn*, 27, was relied upon by the court. The doctrine of both these cases was approved by LORD MANSFIELD, in *Shubrick v. Salmon*, 3 Burr. 1640. See *Whitbeck v. Skinner*, 7 Hill (N. Y.) 53; *Kelsey v. Ward*, 16 Abb. Pr. (N. Y.) 98; *Myres v. Burns*, 35 N. Y. 269. In the New York cases cited, it was held that while the failure of the landlord to repair as he had covenanted to do does not release the tenant from the payment of the rent, yet he may *recoup* his damages in an action by the landlord to recover the rent. The principle deducible from all the cases is, that the rent issues out of the land without reference to the *structures* upon it; and that, as a legit-

imate consequence, the landlord's right thereto continues, although the structures may be destroyed, or become unfit for the purposes for which they were leased; or, indeed, for any purpose. The principle is apparently harsh in its effect upon the tenant, but nevertheless it is no more harsh in its operation upon him than a contrary rule would be upon the landlord. Both parties are presumed to know that buildings are exposed to destruction by the elements. That accidental fires may burn, or tempests, floods and inundations destroy them, or render them valueless, and if the tenant does not desire to take the risk incident to these casualties, it is his duty to provide against such contingencies in the lease, and failing to do so, his liability is unquestionable unless the statute relieves him therefrom, as is the case in New York Laws of 1860, Chap. 845, page 592. In New York, prior to the adoption of this statute, the common law rule prevails. *Willard v. Tillman*, 19 Wend. (N. Y.) 358; *Gates v. Green*, 4 Paige Ch. (N. Y.) 355; *Hallett v. Wylie*, 3 John. (N. Y.) 44; *Patterson v. Ackerson*, 1 Edw. Ch. (N. Y.) 96. And it was held that this liability continued even though the lease contained a covenant to pay rent "so long as permitted to occupy the premises" in the manner stated in the lease; *Willard v. Tillman*, ante; or, although the landlord covenanted to rebuild, but failed to do so, *Hallett v. Wyle*, ante, or to repair. *Allen v. Culver*, 3 Den. (N. Y.) 284.

² *Diggs v. Maury*, 23 La. An. 59.

³ Where, in a lease of a dairy-farm for five years, the lessor agreed to put the barns on the premises in a good state of repair, but neglected to do so, it was held, that the damages of the lessee,

States where the statute is broad enough to admit of it, may enforce his damages by way of set-off, and in the latter case may recover any balance that he ought to have by way of damages in excess of the rent.¹

SEC. 379. No implied covenant that premises are, or shall remain, fit for use for purposes for which they were leased.—There is no implied contract on the part of a landlord that the leased premises are tenantable,² or that they shall

which he was entitled to recoup in a suit for rent, were the amount it would cost to put the barns in repair, and not the detriment which he suffered by their remaining out of repair during the term. *Dorwin v. Potter*, 5 Den. (N. Y.) 306. In an action of covenant by a lessor against two lessees, for rent due upon a lease containing a covenant on the part of the lessor that he will put the demised premises in repair, the plaintiff will not be nonsuited for a failure to prove that the premises were put in repair, before possession was taken under the lease, nor because it appears that one of the defendants never went into possession with the other lessee, the taking of possession by one of the lessees being in law a possession by both, and a waiver of the condition precedent, of putting the premises in repair, and the fact that the premises were out of repair being a matter of defence, to be proved by the defendants. *Harger v. Edmonds*, 4 Barb. (N. Y.) 256. Damages occasioned to a tenant by great, unnecessary, and tortious negligence, and delay of the landlord's servants in making repairs upon the premises during the term, and by the unworkmanlike manner of doing the work, cannot be set up as matter of recoupment in an action by the landlord for the rent. *Cram v. Dresser*, 2 Sandf. (N. Y.) 320.

¹ *Andrus v. Fink*, 8 Ill. App. 389. It is held that a tenant of a house cannot hold his landlord responsible for damages by dirt and filth resulting upon him from the negligence of an express repairman. The premises in repair; and he could not recover of the landlord, if he

paid a subtenant because of damages thus caused, there being no evidence that he was obliged to pay them. A lessor whose lease did not stipulate that he should keep the premises in repair, and who removed a fence at a point where was a perpendicular descent to the sidewalk, was held, not to be liable for a failure to rebuild the fence and, *a priori*, not for injuries to a child, five years old, of a subtenant, from falling to the sidewalk. And it was immaterial that the child's father had formerly been a tenant of the lessor. *Peterson v. Smart*, 70 Mo. 34.

² *Witty v. Matthews*, 52 N. Y. 512; *Cowell v. Lumley*, 39 Cal. 151; 2 Am. Rep. 430; *Franklin v. Brown*, 53 N. Y. Superior Ct. 474; *Jaffe v. Hartean*, 56 N. Y. 398; *Edwards v. N. Y. Central & H. R. R. Co.*, 98 N. Y. 245; *Cleves v. Willoughby*, 7 Hill (N. Y.) 83; *Chadwick v. Woodward*, 18 Abb. (N. Y.) 12 Cal. 441; *Caulson v. Whiting*, 14 id. 60; *Sutphin v. Seeboss*, 14 id. 68; *Westlake v. Degraw*, 25 Wend. (N. Y.) 659; *Mumford v. Brown*, 6 Cow. (N. Y.) 475; *Carson v. Godley*, 26 Penn. St. 111. In *Fisher v. Light-hall*, 4 Mackay (D. C.) 82, this was applied to furnished houses. Where premises are let for a boarding house, there is no implied warranty that they are or will remain fit for that purpose, *Samuel v. Scott*, 18 Phila. (Penn.) 64. Nor in the lease of a factory, is there an implied warranty as to the condition or capacity of the motive power or machinery, *Naumberg v. Young*, 44 N. J. L. 881; *Hart v. Windsor*, 12 M. & W. 68; *Sutton v. Temple*, 12 id. 52. These two cases overrule the doctrine of *Collins v. Barrow*, 1 M. &

remain tenantable during the term, even though he stipulates to put the premises in repair before the tenant enters, but does not contract to keep them in repair.' He is not bound to repair unless he has expressly agreed to do so *in the lease, or the contract of hiring*;² and a promise to repair made after the lease is entered into, is a mere *nudum pactum*, and no liability exists for a failure on his part to make such repairs.' Nor is there any implied covenant on his part that the premises are fit for the purposes for which they were let;³ and the same rule

R. 112; *Salisbury v. Marshall*, 4 C. & P. 65; *Edwards v. Etherington*, Ky. & M. 208, and essentially qualify and limit, *Smith v. Marable*, 10 M. & W. 5, if they do not in fact overrule its doctrine entirely. The landlord cannot be treated as having *impliedly* covenanted to repair, or that the building is or shall continue to be fit for the purposes for which it was let. *Robbins v. Mount*, 4 Robt. (N. Y. Supt. Ct.) 558. A recital in a lease that the leased premises are to be used as a "boarding-house," even if it implies a covenant that the premises are suitable for occupation as a boarding-house, cannot be so extended by implication as to apply to any particular description of boarding-houses not expressly designated in the lease. *Roosevelt v. Abbott*, 2 Robt. (N. Y. S. C.) 156. Where a mill, with water sufficient to run the same, is leased, the lessor is not bound either to keep the mill in repair, nor to keep water enough to drive the machinery. But he is bound to let the tenant have the benefit of such water as will go to the mill, and if he wrongfully diverts or withholds it, he is liable therefor. In other words, he is not liable for nonfeasance, but is liable for misfeasance. *Morse v. Maddock*, 17 Me. 569. There is no implied contract on the part of a lessor that there is any means of getting access to premises, and, unless the lessor is guilty of fraud in inducing the lessee to believe that there is a road or other feasible means of communication with the premises, the lease is not invalidated because there is none. *Handrahan v.*

O'Regan, 45 Iowa, 298. The rule is, that a tenant must ascertain at his peril whether or not the land is accessible, and the landlord is not guilty of fraud if he fails to appraise the tenant that there is no mode of communicating with the premises. *Handrahan v. O'Regan*, 45 Iowa, 298.

¹ *Banks v. White*, 1 Sneed (Tenn.) 618. There is no implied covenant that the building will endure during the entire time. *Arden v. Pullen*, 10 M. & W. 821; *Keates v. Earl of Cadogan*, 10 C. B. 591; *Gott v. Gandy*, 2 E. & B. 845; *Minor v. Shanon*, 113 Mass. 477; *Dutton v. Gerrish*, 9 Cush. (Mass.) 89; *Royce v. Guggenheim*, 106 Mass. 201; *Welles v. Castle*, 3 Gray (Mass.) 823; *Foster v. Peyser*, 9 Cush. (Mass.) 242. And this is held to be the rule whether the house is let furnished or unfurnished. *Fisher v. Lighthall*, 4 Mackay (D. C.) 82; 54 Am. Rep. 258. In *Lucas v. Conder*, 104 Ind. 81, the court say that this rule applies to a house, store or any species of building.

² *Brown v. Burrington*, 36 Vt. 40; *Brewster v. DeFremery*, 33 Cal. 341; *Estep v. Estep*, 23 Ind. 114; *Fowler v. Bott*, 6 Mass. 63. And even if he has expressly agreed to repair, in the absence of a provision to that effect the tenant cannot quit the possession. *Surplice v. Farnsworth*, 7 M. & G. 376.

³ *Gottsberger v. Radway*, 2 Hill. (N. Y. C. P.) 342; *Libbey v. Tolford*, 48 Me. 316.

⁴ In *Sutton v. Temple*, 12 M. & W. 52, this was well illustrated. In that case the defendant agreed in writing to take the cottage of a pasture at a certain rent. It

applies in this respect whether the lease relates to lands merely, or buildings.¹ Nor is there any implied condition that buildings or land will remain fit for the purposes for which they were leased; and in the case of a house or other building, "if it is blown down or destroyed by fire,"

turned out that the pasture was covered with some poisonous substance that poisoned the cattle, and several of them died. The defendant thereupon took his cattle away and refused to occupy the pasture or pay the rent. It appeared that paint had been strewed over the premises, which produced the ill results, and that the plaintiff had no knowledge of the fact at the time of letting. The court held that the plaintiff was entitled to recover. LORD ABINGER, C. B., in the course of an able opinion, says: "I take the general rule of law to be, that if a person contracts for the use and occupation of land for a specified time, and at a specified rent, he is bound by that bargain, *even though he took it for a particular purpose, and that purpose be not attained.* Suppose, for instance, he took it with the object of making a handsome income out of it, as a farm; if his object fail altogether, is it to be said that he is not liable for any rent? * * The general rule must therefore be, that where a man undertakes to pay a specific rent for a piece of land he is obliged to pay that rent whether it answer the purpose for which he took it or not. Suppose the defendant had put into the field no cattle at all; he must have paid his rent, although, in one sense, he had no beneficial occupation. The right of the landlord to the rent does not depend upon that." In a case decided by the same court, at the same time, the same rule was applied to a dwelling. In that case the defendant, to a declaration upon a lease for rent, set up in defence, that the house was blown down, and that he was not to blame for it. The court held for him for a dwelling-house, the purpose of inhabiting being the same, and that before, and at the time of the letting, as well as when the house was blown down, it was not fit for habitation, and that he could not recover the rent, although by reason of its being blown down with

bugs, and that in consequence of the untenable condition of the house he quit the possession of the same before any rent became due. The defendant insisted that in a lease of a dwelling there is an implied contract that it is fit for habitation; but the court held otherwise, PARKE, B., saying: "We are all of opinion that there is no contract, still less a condition, implied by law on the demise of real property only, that it is fit for the purpose for which it was let. The principles of the common law do not warrant such a position; and though, in the case of a dwelling-house, taken for habitation, there is no apparent injustice in inferring a contract of this nature, the same rule must apply to land taken for other purposes—for building upon, or for cultivation; and there would be no limit to the consequences that would ensue." And the same principle is applied in cases of a verbal lease from month to month. See opinion of SMITH, J., in *Laughin v. Kief*, Buffalo Superior Ct. Dec. T. 1876, briefly reported, vol. 15, page 255, Albany Law Journal.

¹ *Sutton v. Temple*, 12 M. & W. 52; *Hart v. Windsor*, 12 id. 66. See previous note for a full resumé of these cases.

² *Monk v. Cooper*, 2 Stra. 763; *Balfour v. Weston*, 1 T. R. 310; *Ainsley v. Rutter*, cited 1 T. R. 312; *Linn v. Ross*, 10 Ohio, 412; *Bussman v. Ganster*, 72 Penn. St. 285; *Willard v. Tillman*, 19 Wend. (N. Y.) 858; *Gates v. Green*, 4 Paige Ch. (N. Y.) 855; *Hallett v. Wylie*, 8 John. (N. Y.) 44; *Patterson v. Ackerman*, 1 Edw. Ch. (N. Y.) 96; *Cowell v. Lumley*, 85 Cal. 151; 2 Am. Rep. 430; *Izon v. Gorton*, 5 Bing. N. C. 501; *Brown v. Quilter*, Amb. 619; *Baker v. Haltzaffell*, 4 Taunt. 45; *Sheets v. Selden*, 7 Wall. (U. S.) 423; *White v. Malynaux*, 2 Ga. 126; *Beach v. Farrish*, 4 Cal. 849. And the rent may be

or gained upon by the sea,' or the occupation is rendered impracticable by the king's enemies or the casualties of war,' is swept away by a freshet,"¹ the estate of the lessee continues, and he is liable for the rent thereof for the full term.⁴ And the same rule prevails when buildings become untenable by reason of inherent defects therein,⁵ unless the landlord has been guilty of fraud or

recovered in an action for use and occupation, because the tenant is treated as being in the occupancy of the premises so long as his interest therein continues; and as his interest is not determined by the destruction of the buildings by fire, this mode of declaring against him is proper. *Izon v. Gorton*, ante. Upon this point, TINDAL, C. J., in the case last cited, said: "The Statute 11 G. 2, c. 19, enables landlords 'to recover a reasonable satisfaction for lands, &c., held or occupied by the defendant in an action on the case for the use and occupation of what was, &c., held or enjoyed,' from which it seems to follow, that if there is an actual holding, and the power to occupy and enjoy is given by the landlord to the tenant, so far as depends on the landlord, the action is maintainable." *Robinson v. L'Engle*, 13 Fla. 482.

¹ *Tavener's Case*, Dyer, 56 a. Where, however, the land is swept away or gained upon by the sea, as to that so swept away or gained upon by the sea the rent ceases, because as to that portion of the estate the tenant ceases to have any interest, and the estate of the landlord therein also ceases, because it becomes a part of the public domain by the act of God. 7 Bacon's Abr. 63; Rolle's Abr. 236. But the mere fact that the land is permanently covered with fresh water does not excuse the tenant from rent, because the estate remains. Roll's Abr. 236. But this would depend upon the question whether it thereby became a part of a fresh water navigable stream, and whether the land, by the law of the State, is treated as thereby becoming the property of the State or as still being the property of the landlord.

² *Paradine v. Jane*, Alleyn, 26; *Coy v. Downie*, 14 Fla. 544; *Robinson v. L'Engle*, 13 id. 482.

³ *Carter v. Cummins*, 1 Cha. Cas. 84; *Robinson v. L'Engle*, 13 Fla. 482.

⁴ *Baker v. Haltpzaffell*, 4 Taunt. 45.

⁵ *Arden v. Pullen*, 10 M. & W. 321; *Gott v. Gandy*, 2 E. & B. 845. This doctrine is well illustrated by a case recently decided by the Special Term in the First Department of New York. *The Hartford & N. Y. S. B. Co. v. The Mayor, &c., of New York*, 12 Hun (N. Y. S. C.) 550. In that case the city of New York leased a wharf to the plaintiffs for the period of ten years from the 1st of May, 1865. The lease contained a covenant on the part of the plaintiff to keep the wharf in repair, but the plaintiff insisted that, before the making of the lease the defendant represented that the substantial repairs would be made by it. That the wharf was old and insecure, and in 1867 fell down, and the plaintiffs rebuilt it at an expense of about \$30,000, to recover which this action was. The plaintiff insisted that, inasmuch as it was the duty of the defendant, as to the public, to keep the wharf in repair, and in a safe condition as a part of the public street, and had represented to it that it (the defendant) would make the substantial repairs, it was liable to the plaintiff for the expense and loss sustained by it in rebuilding the wharf. But the court held that, as in the lease the plaintiff had stipulated to make all repairs of every kind at its own expense, and as there was no fraud or concealment on the part of the defendant, the defendant could not be permitted to vary the express covenants of the lease by showing

improper concealment, or there has been some default in respect of a positive duty to the tenant on the part of the landlord.

representations made by the defendant before the lease was made, nor did the fact that the defendant was bound, as to the public, to keep the wharf in repair, and in a safe condition, change the relative liabilities of the parties under the lease, and that no recovery could be had for the expense of the repairs. The court might have gone further and held that there could be no recovery in any event for the expense of rebuilding the wharf, because it was not done under such circumstances that any

request on the part of the defendant to that end could be implied. The plaintiff having stipulated to repair was not bound to rebuild, but if it elected to do so it could not charge the defendant with the expense, because it was a voluntary act on its part, and, as no duty *under the contract* existed on the part of the defendant to it to rebuild, or could be implied from their relation, it was remediless. See also *Lockrow v. Horgan*, 58 N. Y. 635; *Witty v. Matthews*, 52 id. 512.



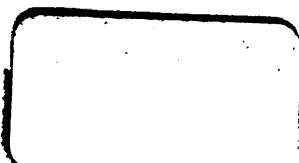




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